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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 688

HAYS FINANCE COMPANY, INC., ET AL.,
Appellants,

vs.

MRS. THOMAS L. BAILEY, STATE TAX COLLECTOR

STATEMENT AS TO JURISDICTION

In compliance with Rule 12, appellants submit this statement, particularly disclosing the basis upon which this Court may review the judgment of the Supreme Court of Mississippi herein.

Opinion Below

The opinion of the Supreme Court of the State of Mississippi in this case is reported in 54 So. 2nd 727, and upon suggestion of error in 56 So. 2nd 76 (Adv. Sh.), and upon motion as to its being a final judgment, February 18, 1952, all annexed hereto as Appendices 1, 2, and 3, respectively.

Jurisdiction

The initial judgment of the Supreme Court of the State of Mississippi was entered on November 12, 1951, and the final judgment on the suggestion of error was entered on

January 7, 1952, and a petition for appeal to this Court was presented to Mr. Justice Roberds, presiding Justice of Division B, wherein said decision was, of the Supreme Court of the State of Mississippi on, to-wit: the 26th day of February, 1952. The jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28, *U.S.C.A.*, Sec. 1257 (a), Ch. 646, 62 Stat. 929.

The following decisions sustain jurisdiction of this Court to review the judgment on direct appeal in this case: *Memphis Steam Laundry Cleaner, Inc.* v. *Stone,* No. 253, October Term, 1951, decided March 3, 1952;[1] *Standard Oil Co.* v. *Peck,* No. 184, October Term 1951, 20 Law Week 4113; *Pullman Co.* v. *Adams,* 189 U.S. 419, 47 L. Ed. 877; *Federal Compress & Warehouse Co.* v. *McLean,* 291 U.S. 17, 78 L. Ed. 622; *Interstate Oil Pipe Line Co.* v. *Stone,* 337 U.S. 662, 93 L. Ed. 1613; *Stone* v. *Reichman-Crosby Co.,* 339 U.S. 917, 94 L. Ed. 1342.

The Precise Questions Involved

The questions involved in this case and presented to the Court for its decision are as to whether Section 9696-135, Mississippi Code of 1942 (all references to Code sections herein are to the Mississippi Code of 1942, as amended), providing:

> "Upon each person doing a money lending business where a greater rate of interest than fifteen per cent (15%) per annum is charged, whether the loan is secured or unsecured, or whether by taking bills, of sale, absolute or conditional.....$2,000.00";

violates, insofar as the business done by the Hays Finance Company, Inc., (hereinafter called "Finance") at Jackson, Mississippi, with the Southern Discount Corporation

[1] (Added herein and due notice given Appellee thereof.)

(hereinafter called "Discount") at Baton Rouge, Louisiana, is concerned:

I. The Due Process Clause of the Fourteenth Amendment reading:

> "• • • No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis ours.)

There being inherently integrated into this question (a) the effect of the Due Process Clause per se, especially the displacement of Louisiana law applicable by integrating thereinto Mississippi's law, *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 78 L. Ed. 1178; *Dice* v. *Akron, Canton & Youngstown R. Co.*, No. 374, October Term, 1951, 20 LW 4120; and (b) per quod (1) the effect of a privilege tax statute contravening the Commerce Clause and assuming to admeasure appellant's rights and a disregard of the Full Faith and Credit Clause vouchsafing validity to Louisiana statutes. Compare *Commonwealth Finance Co.* v. *Livingston*, La. App., 12 So. 2nd 44; and (2) Louisiana Small Loan Law, Acts of 1928, No. 92, Acts of 1928, Ex. Ses., No. 7, Acts of 1940, No. 108, amending Acts 1928, No. 92, Acts of 1942, No. 94, Louisiana Revised Statutes of 1950, R.S. 6:571-593; Louisiana Civ. Code, Art. 1757, Subd. 2; Art. 1759, subd. 1, substantially allowing retention by the lender of money received, as opposed to Section 36, Mississippi Code of 1942, whereunder complete forfeiture was. But see *Home Finance Co. Inc.* v. *Padgett*, La. App. 54 So. 2d 813.

And, basically integrated into Question I and essentially determined by the Supreme Court of Mississippi:

II. The Commerce Clause, Art. I, Para. 3, Sec. 8, providing

> "The Congress shall have Power:
>
> • • • • • • •
>
> "3. To regulate Commerce with foreign Nations and among the several States, • • •.";

And, also, collaterally, the Full Faith and Credit Clause, Art. IV, Sec. 1:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. • • •."

The City of Jackson precedently granted to Finance a license under Section 9696-115, providing:

> "Loan Brokers. Upon each person engaging in this State in the business of brokering or negotiating loans through industrial loan companies or other similarly designated loan institutions, on personal or other securities, *as agent for another,* and receiving a brokerage, commission, or other compensation for such service as follows:
>
> "In municipalities of class 1 . . . $50.00." (Jackson being a Class 1 municipality). (Emphasis ours.)

The Supreme Court of Mississippi held that said Section 9696-135, quo ad that done by Finance, was valid and denied Finance's claim under the Federal Constitution duly made.

The Federal Questions Herein Presented Are Substantial and Were Assumed by the Supreme Court of the State of Mississippi to Be Decided Not in Accordance With the Decisions of This Court.

These questions are hereinabove stated and here integrated by reference to save prolixity. The Supreme Court of Mississippi has denied Finance's Federal rights, sustaining Mississippi statute as valid, and denying that it contravened the Constitution as claimed.

Statement

Mrs. Thomas L. Bailey, State Tax Collector (whose power to sue is conferred by Sections 9184-93) instituted in the Circuit Court of Hinds County, First District, Cause No. 12,460 (R. 1), for the taxes under said Section 9696-135 for the year 1949, and in Cause No. 12,645, for the taxes for the year 1950, against Finance, alleging liability therein therefor (R. 1), predicating her cause of action exclusively upon the validity of said Section 9696-135. Finance answered (R. 5) and the facts appear by stipulation (R. 7) and uncontradicted testimony, thus:

1. The City of Jackson duly enacted a municipal ordinance making Section 9696-135 applicable (R. 7).

2. On May 19, 1947, Discount was lawfully chartered by Louisiana, possessing, under Article III of its charter inter alia the right, R. 30:

> "To lend money on and generally buy, sell and otherwise deal in, mortgages and mortgage notes, • • •."

And so thus did at Baton Rouge, Louisiana, being in no way connected with Finance and never having qualified to do nor doing any business in Mississippi.

3. The extent of Discount's resources do not herein in any wise appear, but it made many loans to persons in Jackson, brokered by Finance. Discount retained the notes at Baton Rouge until repaid. Discount did not pay Finance any commission, compensation, salary or remuneration in any form whatever.

4. Discount does not receive the note and credit information until three or four days after the borrower has obtained the money, but Discount reserved the right to reject any note sent (but has not done so), and in addition has the absolute guarantee of Finance.

5. Finance was a Mississippi corporation domiciled at Jackson where it did a brokerage business.

6. Its financial condition does not herein specifically appear.

7. Discount executed to Finance a written authorization reading, R. 25:

"SOUTHERN DISCOUNT CORPORATION,
SORREL & NEOSHO,
P. O. Box 2131,
Telephone 4-4324,
Baton Rouge, Louisiana.

September 1, 1948.

HAYS FINANCE COMPANY, *Brokers,*
202 West Capitol,
Jackson, Mississippi.

Dear Sir:

Authorization is hereby given Hays Finance Co., Brokers and its customers *to draw drafts on our account located in the Fidelity National Bank of Baton Rouge, La.*

It is understood that for each Draft drawn, a corresponding note will be sent us under separate cover bearing your Guarantee of payment.

It is required that all notes bearing your guarantee be paid by the end of the second month following final due date.

We, of course, reserve the right to reject any notes you may send us, also we reserve the privilege of cancelling the above authorization by giving you written notice.

Very truly yours,

HARRY L. BIVINS,
President."

(Emphasis ours.)

8. Pursuant thereto, at Jackson, Finance utilized in its business as broker certain statements of prospective borrowers, R. 26, specifically providing:

> "For the specific purpose of obtaining credit through your company as broker from a person or company willing to lend money to the undersigned, I/we warrant all of the following representations to be complete and true and I/we authorize your company to use these statements in negotiating my/our desired loan and to procure and accept credit on the strength thereof."

This was signed by every proposed borrower at Jackson, who accepted and paid the brokerage rates posted by Finance as containing the terms upon which it would broker. The record shows no deviation therefrom, complete compliance therewith, and no adverse action taken by any borrower-customer.

9. Loans were limited and thereasto when Finance had determined that it was willing to unconditionally guarantee as broker, the borrower then executed a note at Jackson thus, R. 27:

> "No. — Time — Baton Rouge, La., —— —, 19—
>
> After date, as herein set forth, for value received, I, we or either of us, promise to pay to the order of

Southern Discount Corporation at their office in Baton Rouge, La., the sum $———, together with interest at the rate of six per cent per annum on all unpaid balances, the principal of this note being payable in the following manner:

$—— on the — day of —— —, 19—; $—— on the — day of —— —, 19—, and the same amount ——— thereafter until the total amount of principal and interest provided for herein shall be paid. Default in the payment of any installment shall authorize the payee to declare the entire amount immediately due and payable without notice to the undersigned.

The makers and endorsers of this note agree to pay all cost of collection, including a reasonable attorney's fee, whether incurred by suit against one or more of said makers or endorsers, or otherwise. Demand, notice and protest, and all steps necessary to bind each maker and endorser hereon on the non-payment of this note, are hereby waived by each maker and endorser.

It is understood and agreed by each person whose name is signed hereunder, that he signs this note without condition, reservation, or representation as to any other person or persons having signed the same, or that any other person or persons shall sign the same, as maker or endorser, and without any condition or reservation as to delivery, execution or otherwise, and that all signers of this note are makers."

10. Discount never received payment other than the principal of and interest on such notes. It did not in any way participate in the brokerage paid Finance thereasto, having, insofar as this record discloses, no connection whatever with the making of the charges by Finance nor any right to control Finance in any matter whatsoever otherwise than the written contract specifically provided. Compare *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 334, 69 L. ed. 982; *Rosenberger* v. *Pacific Exp. Co.*, 241 U. S.

48, 60 L. ed. 880. In *Tower Underwriters, Inc.*, v. *Lott*, 210 Miss. 389, 49 So. 2nd 704, Syl. 2 reads:

> "A resident corporation (Finance) may lawfully charge and collect a brokerage fee or service fee from a borrower for placing a loan for him with a nonresident corporation (Discount) and for guaranteeing payment of such loan without violating the usury statute." (Parentheses ours.)
>
> *Griffin* v. *Maryland Casualty Co.*—Miss. —, 57 So. (2nd) 486

Approving *New England Mortgage Security Company* v. *Townes*, Miss., 1 So. 242, wherein this rule was thought to be so well settled as not to require the reporting of this case officially.

11. Each borrower at Jackson executed a draft thus, R. 27:

"$..... No.....

CUSTOMER'S DRAFT

Jackson, Miss., —— —, 19—.

..... At Sight .....

Pay to the Order of ..... Myself .....

..... Dollars.

Value Received and Charge Same to Account of
Southern Discount Corporation
Fidelity National Bank
Baton Rouge, Louisiana

....."

This draft was executed at Jackson but drawn on Discount at Baton Rouge and there solvable, and actually paid by Discount.

12. If any note was not paid by the borrower—they usually were all paid—then after the lapse of the two months' period, under Finance's guarantee, it would be paid by Fi-

nance and transferred to it for collection of its face with 6% interest whereasto Mississippi's court seems to have raised no objection.

13. The agreed facts recite in part, R. 7:

> "8. *A draft is drawn and signed by the customer, payable to himself, on the Southern Discount Corporation of Baton Rouge, Louisiana, for the full amount of the note. The customer can get the draft cashed elsewhere, but as a general rule the defendant will cash it for him upon the customer's endorsing the draft;* and when the draft is cashed, the customer pays the defendant its charges and the interest on the note.
>
> "9. The defendant guarantees the payment of the note unconditionally by writing on the back of the note, 'Payment of this note guaranteed. Hays Finance Company, Brokers'; and at the close of that business day, the notes of that day's business and the interest collected on these notes are sent by mail to the Southern Discount Corporation and, through regular mail channels, arrive in Baton Rouge, Louisiana, and are delivered to the Southern Discount Corporation about two days later.
>
> "10. The drafts which the defendant has cashed that day for the customers are placed by the defendant in what is called an envelope draft, that is, an envelope with a draft on the outside and which draft is filled out for the sum total of the drafts enclosed within the envelope; and this envelope draft is drawn on the Southern Discount Corporation by the defendant through regular banking channels, and the envelope drafts are usually put in the bank to defendant's account on the day following the mailing of the notes to the Southern Discount Corporation at Baton Rouge, Louisiana.
>
> "11. The notes are payable in either weekly, semi-monthly or monthly installments, and the customer makes payments on said installments at the office of the defendant, and the defendant sends each of the

payments to the Southern Discount Corporation at Baton Rouge, Louisiana." (Emphasis ours.)

14. It was further stated in the agreed facts, R. 7:

> "* * * It has, however, paid to the City of Jackson, Mississippi, a privilege tax of $50.00 per annum for the privilege of engaging in the business of a loan broker under Section 9696-115 Code of 1942."

15. As payments are made in Jackson, "the full payments are transmitted to the Southern Discount Corporation", R. 10.

16. The Circuit Judge, sitting as judge and jury, held very unexpectedly to Finance that it was a money lender and liable under Section 9696-135 and not, as Finance had always assumed, solely liable to the City under Section 9696-115 as a broker.

17. The bases for this fundamental surprise to Finance were:

(a) Jackson accepted as appropriate a broker's license for Finance's business and no customer employing Finance as a broker herein testified that the transactions were other than those contained in the written documents and appellee introduced no evidence whatsoever other than the face of these papers that the transactions were not as they seemed to be. Under the law of Louisiana, it was held in *People's Bank & Trust Co.* v. *Fenwick Sanitarium*, 130 La. 723, 58 So. 523, Syl. 1:

> "Negotiable instruments may be sold for whatever the seller and the buyer may agree on, and where the evidence shows the notes sued on were bought by the holder and were not given merely as the evidence of a loan, the maker will not be heard to say that the difference between the price of the notes and their face value is usurious interest, and that therefore the holder should not be allowed to recover this sum."

In *Houghton* v. *Burden*, 228 U. S. 161, 57 L. Ed. 780, 785, this Court said:

> "Canfield is supported by his bookkeeper, though her account of the matter is materially different from his. Burden is supported by Koehler, the broker, who was in the negotiations throughout, and so far as appears, absolutely disinterested. There are two witnesses against two, and the burden to make out the usury is strongly upon the appellant. Stillman v. Northrup, 109 N. Y. 473, 478, 17 N. E. 379; White v. Benjamin, 138 N. Y. 623, 624, 33 N. E. 1037. In the case last cited, it was said:
>
> " 'Usury is a crime; and he who alleges it as a defense to an obligation must establish it by clear and satisfactory evidence.'
>
> "This the appellant has not done."

See *Tower Underwriters, Inc.* v. *Lott*, 210 Miss. 389, 49 So. 2nd 704; *Dice* v. *Akron, Canton & Youngstown R. Co.*, No. 374, October Term, 1951, 20 LW 4120. In this record there is not one iota of testimony to challenge the appropriate performance of the contracts as written or to show participation by Discount in the brokerage or participation by Finance in the interest, until, when, if and after default was made by the borrower, Finance was called upon to make good to Discount under its unconditional guarantee and then after having thus done it attempted to collect as a subsequent holder the face of the note with its interest at 6% and no more.

(b) To convert customer's notes dated at Baton Rouge, payable at Baton Rouge and bearing interest in favor of Discount at 6%, controlled completely by the law of Louisiana and valid thereunder, into obligations controlled by the law of Mississippi, whereunder by Section 36 it is said:

> "• • • If a rate of interest is contracted for or received, directly or indirectly, greater than twenty per

centum per annum, the principal and all interest shall be forfeited, *and any amount paid on such contract may be recovered by suit.*" (Emphasis ours.)

Compare *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178. Discount was continuously resident in Louisiana and not in any way a party and not doing business in Mississippi. Compare *Reichman-Crosby Co.* v. *Stone*, 204 Miss. 122, 37 So. 2nd 22; *Stone* v. *Reichman-Crosby Co.*, — Miss. —, 43 So. 2nd 184, certiorari denied, 339 U. S. 917, 94 L. Ed. 1342.

(c) With Finance doing business at Jackson as a broker and Discount doing business at Baton Rouge as a lender after customers completed all transactions in manner and form as the written obligations provided, the judgment deprived Finance of its property without due process by a privilege tax making the interstate commerce thereasto illegal.

(d) Mississippi's privilege tax, under Section 9696-135 as the judgment held, was given extra-territorial effect, quo ad business in Louisiana. Compare *Standard Oil Company* v. *Peck*, No. 184, October Term, 1951, 20 LW 4113.

(e) Appellant was deprived of the right to enjoy the incidental and essential privileges inherently made requisite by (a) the Commerce Clause, and (b) the Full Faith and Credit Clause. See *Dice* v. *Akron, Canton & Youngstown R. Co.*, No. 374, October Term, 1951, 20 LW 4120; *Rochin* v. *California*, No. 83, October Term, 1951, 96 L. Ed. 154 (Adv. Sheets.)

(f) Section 9696-135, as construed by Mississippi's Court, denied Finance the right to contract in manner and form as the Constitution permitted and especially sought to integrate into such contracts Mississippi law, wherefor there was no constitutional warrant. *Hartford Accident & In-*

demnity Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178.

(g) This judgment under this statute assumed to make, quo ad Finance's business, Section 36, Mississippi Code of 1942, paramount to and subversive of Louisiana's law. Civil Code, Art. 1757, Subd. 2; Art. 1759, Subd. 1; Act No. 92 of 1928, as amended by Act No. 108 of 1940.

(h) The alleged presumptions as to this agreed record assumed to be created by Mississippi's court to invalidate the contract as written had no constitutional basis. *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 55 L. Ed. 78; *Tot* v. *United States*, 319 U. S. 463, 87 L. Ed. 1519.

18. As soon as the Circuit Judge had so thus done, a new trial was forthwith sought and therein violation of the Fourteenth Amendment specifically relied upon, R. 36, and specifically overruled, R. 37, but without opinion, embrasive, we submit, of the collateral rights under the Commerce Clause and the Full Faith and Credit Clause, which Clauses rendered null the statute which was utilized by Mississippi's court to take appellant's property. In short, when Mississippi's court under this statute took that which was appellant's under unconstitutional statutes, deprivation of property without due process was. *Standard Oil Company* v. *Peck*, No. 184, October Term, 1951, 20 LW 4113; *Rochin* v. *California*, 96 L. Ed. 154 (Adv. Sheets).

Federal Questions, How Presented

Appellee sued Finance herein, averring liability pursuant to Section 9696-135, Mississippi Code of 1942, imposing privilege taxes upon money lenders. Finance in its answer specifically averred its business to be that of broker and not of a money lender, R. 5. With the facts stipulated, the Circuit Judge rendered judgment holding Finance to be not a broker but a money lender exacting interest at a rate

in excess of 20% per annum. As above stated Federal rights were forthwith claimed, it not being dreamed that Finance's business could be tortured into a lending of money, *Tower Underwriters, Inc.* v. *Lott,* 210 Miss. 389, 49 So. 2nd 704; *Abraham* v. *Friendly Finance Co. of Biloxi,* 205 Miss. 71, 38 So. 2nd 323, wherein when the parties borrowing sought to have the loans declared usurious inter se Mississippi's court refused thus to do but when the parties doing the business have not thereasto made complaint, appellee has sought to convert the broker-lender relationship of Finance and Discount into a lender relationship upon the part of Finance and subject solely to Mississippi's jurisdiction excluding the national power thereover.

Motion for a new trial was forthwith made wherein as a ground therefor was assigned, R. 36:

> "9. The judgment of the Court enforces the payment of a privilege tax which has not been imposed on this defendant by the Legislature or any constitutional authority of the State of Mississippi, and is the taking of property without due process of law and violates the due process clause of both the State and the Federal Constitutions."

These motions containing the specific invocation of the Fourteenth Amendment were overruled by the court, R. 37, R. 67. Upon appeal to the Supreme Court of Mississippi, the assignment of errors specifically set up, R. 39:

> "9. The judgment of the Lower Court enforces the payment of a privilege tax which has not been imposed on this defendant by the Legislature or any constitutional authority of the State of Mississippi, and is the taking of property without due process of law and violates the due process clauses of both the State and Federal Constitutions."

In appellant's brief in the Supreme Court of Mississippi, supporting its assignment of error, was Point III captioned:

> "THE JUDGMENTS CONSTITUTE AND ARE THE DEPRIVATION OF THE PROPERTY OF THE APPELLANT WITHOUT DUE PROCESS OF LAW AND IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION AND SECTION 14 OF THE MISSISSIPPI CONSTITUTION OF 1890."

Whereunder there is a direct invocation of the Fourteenth Amendment and the Supreme Court of Mississippi affirmed without mentioning the Federal questions, necessarily thereby adversely determining. Compare *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832.

Thereafter, appellant suggested error and in said suggestion of error assigned, R. 44:

> "2. The judgments against the appellant are in violation of the 14th Amendment to the Federal Constitution, for the state has rendered a money judgment against appellant without due process of law.
>
> "3. The judgments are in violation of the Commerce Clause of the Federal Constitution, being Art. 1, Sec. 3, Cl. 8, for the transactions here involved were on written instruments negotiated solely through interstate commerce, which Congress has the sole power to regulate."

Thereasto, the Supreme Court of Mississippi delivered a short opinion wherein it declared an adherence to its prior judgment, denying the Federal claim of appellant under the Fourteenth Amendment, whereasto our principal reliance is, and supplementally declared, R. 46:

> "On this suggestion of error appellant raises, for the first time in this case, the proposition that the judgments affirmed by our original opinion are in alleged violation of the interstate commerce clause of the United States Constitution. * * *."

ARGUMENT

Premliminary Statement

We were associated, after affirmance by Mississippi's court of the judgment herein, solely to present to this Court the Federal questions, and we made thereasto an exhaustive examination before taking this appeal. The necessities of client involve conservation of resources and in this determination, having developed all of those cases cognate and pertinent upon the merits, we make the same available in Appendices 4, as to the Due Process Clause, and 5, as to the Commerce Clause, for such use, if any, as this Court may in its discretion desire to make thereof, in no way seeking to impose hereby additional labor hereasto but setting forth in these appendices, at the Court's pleasure, that found for such guidance as to jurisdiction as it may deem appropriate. These appendices, 4 and 5, save at the Court's pleasure, may be completely disregarded, but, with deference, are strongly supportive of that set forth in this jurisdictional statement.

QUESTION I: SECTION 9696-135 AS MADE OPERATIVE BY JACKSON'S MUNICIPAL ORDINANCE, QUO AD FINANCE, CONSTITUTES A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRAVENING THEREBY THE FEDERAL CONSTITUTION.

QUESTION II: THE COMMERCE CLAUSE AND THE FULL FAITH AND CREDIT CLAUSE AS WELL WHICH HEREINTO ARE INTEGRATED UNDER THE NECESSITY OF MAKING APPLICABLE SAID ORDINANCE AND SAID STATUTE WHICH ALONE FORM THE PREDICATE FOR THE LIABILITY IMPOSED.

Question I

Section 9696-135 as made operative by Jackson's Municipal Ordinance, quo ad finance, constitutes a deprivation of property without due process of law, contravening thereby the federal constitution.

1. Both Finance and Discount had under the Constitution rights to contract whereof Mississippi might not deprive

them. Compare *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. Ed. 832. See also *Rochin* v. *California*, No. 83, October Term, 1951, 96 L. Ed. 154 (Adv. Sheets).

2. Finance was a Mississippi corporation domiciled at Jackson therein and not connected directly or indirectly with Discount likewise domiciled at Baton Rouge, Louisiana.

3. Finance did not receive directly nor indirectly any participation whatsoever from those amounts loaned by Discount to borrowers in Mississippi. Thereasto no relationship other than that affirmatively disclosed in writing between Discount and Finance existed and of the facts in matters constitutional this Court makes its own determination. Compare *Norton Co.* v. *Department of Revenue*, 340 U. S. 534, 95 L. Ed. 517.

4. Before beginning business of any character Finance at Jackson applied to the city for a privilege license under Section 9696-115 whereunder it might as broker do a brokerage business which included all those things usually thereasto appurtenant. Compare *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325, 69 L. Ed. 982; *Rosenberger* v. *Pacific Exp. Co.*, 241 U. S. 48, 60 L. Ed. 880; *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 565, 69 L. Ed. 443; *York Mfg. Co.* v. *Colley*, 247 U. S. 21, 62 L. Ed. 963.

5. The city under Section 9696-208 presumptively required full disclosure of the business to be done by Finance before it determined the amount of the exaction and presumptively determined that the method of business to be done constituted brokerage. Compare *State* v. *Rombach*, 112 Miss. 737, 73 So. 731; *Abraham* v. *Friendly Finance Co.*, 205 Miss. 71, 38 So. 2nd 323; *Greenlee* v. *Hardin*, 157 Miss. 229, 127 So. 777, 71 A.L.R. 741; *Tower Underwriters, Inc.* v. *Lott*, 210 Miss. 389, 49 So. 2nd 704; *New England Mortgage Security Co.* v. *Townes*, Miss., 1 So. 242; *People's Bank & Trust Co.* v. *Fenwick Sanitarium*, 130 La. 723, 58 So. 523;

Houghton v. *Burden*, 228 U. S. 161, 57 L. Ed. 780; *Medical Arts Bldg. Co.* v. *Southern Finance & Development Co.*, C.C.A. 5, 29 Fed. 2nd 969.

6. Thereupon Finance obtained from Discount the contract hereinabove quoted and thereof we reiterate:

> "Authorization is hereby given Hays Finance Co., Brokers and its Customers to draw drafts on our account located in the Fidelity National Bank of Baton Rouge, La."

These drafts were drawn by the borrower, payable to the order of the borrower, and solvable in Louisiana and governed by the law of that state wherein such instruments were not usurious. *People's Bank & Trust Co.* v. *Fenwick Sanitarium*, 130 La. 723, 58 So. 523; *General Securities Co.* v. *Jumonville*, 216 La. 682, 37 So. 2nd 469.

7. Pursuant to its constitutional rights Finance then opened its office and posted conspiciously its charges for services by it to be rendered to the public and invited those so needing such brokerage services to contract with it therefor upon these terms. The amount thereof does not herein appear nor does it directly or indirectly appear herein that such terms so thus accepted by would-be borrowers were unjust or unreasonable nor does it appear herein that those who thus became borrowers were in any way dissatisfied with the contracts which they made whereunder they obtained the loans wherefor they applied, and insofar as this record discloses borrower number one has not sued Finance on the theory that it was a money lender at a rate in excess of 20% per annum, and under the general law of Louisiana might not thus do.

8. After the business of broker had been done by Finance with Discount, Mrs. Bailey, as State Tax Collector with a personal interest, sought recovery against Finance under Section 9696-135, averring liability thereasto in virtue of

Finance being a lender of money at a rate in excess of 20% per annum.

9. Finance denied, averring per contra its sole relationship was that of broker.

10. With issues thus joined, the facts were stipulated and thereasto there is no dispute and therefrom a broker, and not a money lending business, is shown, unless it be that Mrs. Bailey may have the Court presume from facts stipulated that Finance was a money lender, but herein such presumptions may not be, *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 55 L. Ed. 78; *Tot* v. *United States*, 219 U. S. 463, 87 L. Ed. 1519 (these and other cases are as to salient points quoted in the Appendices); because:

(a) Finance collected only brokerage charges and did not participate directly or indirectly in Discount's loan and interest rate, unless it was called upon to make good its guarantee when it received interest at 6% on that advanced.

(b) Discount collected only its loan with interest wherein Finance did not directly or indirectly participate until Finance was called under its guarantee (which was not unlawful in Mississippi, *Tower Underwriters, Inc.* v. *Lott*, 210 Miss. 389, 49 So. 2nd 704).

(c) Mississippi's court presumed to make Finance a money lender and to deprive it of the right to be a loan broker by assuming that it did not have the right as broker when it had unconditionally guaranteed payment to Discount of the note, to cash a draft drawn by the borrower on Discount at Baton Rouge, and make at the borrower's election the proceeds thereof forthwith available, the borrower under the stipulated record having the right to cash these drafts so thus drawn where he pleased. *Rosenberger* v. *Pacific Exp. Co.*, 241 U. S. 48, 60 L. Ed. 880; *Ozark Pipe Line Corp* v. *Monier*, 266 U. S. 565, 69 L. Ed. 443.

(d) The notes being dated at Baton Rouge, for example,

January 1, 1952, and bearing interest after date, were transmitted to Discount at Baton Rouge by mail and each note during the entire period was accepted by Discount and thus the contract became consummated, and Mississippi's court assumed to strike down this contract in writing and perfect, in virtue of the fact that the borrower did obtain at his election from Finance the proceeds of said note through a draft cashed by Finance. This was an inherent contractual right. Compare *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325, 69 L. Ed. 982; *Rosenberger* v. *Pacific Exp. Co.*, 241 U. S. 48, 60 L. Ed. 880.

(e) Mississippi's Court animadverted the use of a so-called envelope draft drawn on Discount by Finance at Baton Rouge enclosing therein each of the several individually drawn drafts of the borrower but the stipulation so shows the business thus to have been, and the reason therefor is perfectly obvious, because if each borrower were compelled to have each draft individually cashed, there would be the usual collection charges on each draft which the borrowers would be required to meet and these charges are so universally collected under clearing house rules as that, assuming there to have been ten drafts of $10 each, each borrower would have been compelled to pay at a minimum 20¢ per draft instead of, if they were all embraced in the envelope draft, 20¢ for the entire $100, and the right to make a loan is a constitutionally guaranteed right, *Colgate* v. *Harvey*, 296 U. S. 404, 80 L. Ed. 299, and with all incidental privileges appurtenant.

(f) Mrs. Bailey completely failed to show (1) that Finance had any money to loan of its own and that its sole connection with the business was not dependent upon the supply of capital at Baton Rouge; (2) that Discount did not have ample funds to loan available at Baton Rouge upon usual terms and Finance and Discount had the constitu-

tional right to form a relationship of broker and money lender upon the terms in writing herein shown and thereof they might not be constitutionally deprived under an alleged presumption wherefor there was no constitutional warrant. *Tot* v. *United States*, 319 U. S. 463, 87 L. Ed. 1519.

11. Further, Mississippi as to these notes dated in Louisiana, paid in Louisiana, could not constitutionally situs them in Mississippi as against Discount so as to

(a) By reason of Section 36, Mississippi Code of 1942, make all of said notes void;

(b) Invalidate absolutely the contract of guarantee between Discount and Finance by thus integrating illegality under Mississippi's law and denying to Discount a cause of action thereon;

(c) By preventing Discount from suing the makers of these notes and recovering from such makers principal and the interest when as between the maker and Discount there was no other relationship other than borrower and lender;

(d) In striking down the guarantee contained in the contract endorsed on the back of each note;

(e) Mississippi as a sovereign state did not have the right to adjudge as between the borrower and Discount that Misissippi's laws were sufficient to annul this transaction which was inherently interstate commerce;

(f) Furthermore, Mississippi was without power to sever and divide the interstate movement and by reason of the segment done in Mississippi attaint the entire transaction, especially when so to do transgressed the law of Louisiana. *Commonwealth Finance Co.* v. *Livingston*, La. App., 12 So. 2nd 44. But note *Home Finance Co.* v. *Padgett*, La. App., 54 So. 2d 813, which, however, is not the opinion of the Supreme Court of Louisiana.

12. Mississippi's court could not so extend Section 9696-135 as to control (a) extra-territorial operation (*Standard*

Oil Company v. *Peck*, No. 184, October Term, 1951. 20 LW 4113); (b) interstate commerce and its incidents (see cases collected under Question II); (c) the Full Faith and Credit Clause whereby Mississippi was required to vouchsafe to Louisiana statutes the same effect in Mississippi as were made operative in Louisiana by Louisiana's court. *Fauntleroy* v. *Lum*, 210 U. S. 230, 52 L. Ed. 1039; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. Ed. 832; *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 306 U. S. 493, 83 L. Ed. 940. See also *Rochin* v. *California*, No. 83, October Term, 1951, 96 L. Ed. 154 (Adv. Sheets).

In short, Mississippi may not as to this business so done displace the national law and the law of Louisiana and make the entire transaction subservient to Mississippi's public policy when the parties to every contract, whereasto this assumption is attempted to be had, performed in manner and form as the writing did prescribe and therewith, though the transaction was across state lines, no dissent was expressed, but complete satisfaction. Thereover the Constitution extends its protection, but whether it so does or not is exclusively for this Court under the invocation appropriately had both in the Circuit and in the Supreme Court of Mississippi. Compare *Mississippi Baptist Hospital* v. *G. R. Holmes*, opinion on Suggestion of Error, — Miss. —, 56 So. 2d 709 (Adv Sheets).

Question II

Section 9696-135 Contravenes the Commerce Clause and the Full Faith and Credit Clause as well which hereinto are integrated under the necessity of making applicable said ordinance and said statute which alone form the predicate for the liability imposed.

1. That done hereunder is commerce. Compare *United States* v. *South-Eastern Underwriters Association*, 322

U. S. 533, 88 L. Ed. 1440. Mississippi assumed to make under Section 9696-135 the prepayment of this tax a condition precedent to the right to do this business. The form of this statute condemns it. Compare *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 65 L. Ed. 165.

2. As to interstate commerce it is a nullity. Compare *Memphis Steam Laundry Cleaner, Inc.* v. *Stone, supra; Buck and Guerra* v. *California*, No. 165 Oct. Term, 1951, 20 LW 4167;[2] *Postal Tel. Cable Co.* v. *Adams*, 155 U. S. 688, 39 L. Ed. 311; *Pullman Co.* v. *Adams*, 189 U. S. 420, 47 L. Ed. 877; *Chassanoil* v. *City of Greenwood*, 291 U. S. 584, 78 L. Ed. 1004; *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, 78 L. Ed. 622; *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 93 L. Ed. 1613.

3. See, especially, as controlling, *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. Ed. 649; *Stockard* v. *Morgan*, 185 U. S. 27, 46 L. Ed. 785; *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 334, 69 L. Ed. 982; *Breard* v. *Alexandria*, 341 U. S. 622, 95 L. Ed. 1233; *Nippert* v. *Richmond*, 327 U. S. 416, 90 L Ed. 760; *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 95 L. Ed. 573; *Memphis Steam Laundry Cleaner, Inc.* v. *Stone, supra.*

4. See, also, as controlling, *Currin* v. *Wallace*, 306 U. S. 1, 83 L. Ed. 441; *Swift & Co.* v. *United States*, 196 U. S. 375, 49 L. Ed. 518; *Dahnke-Walker Mill. Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458; *Stafford* v. *Wallace*, 258 U. S 495, 66 L. Ed. 735; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, 69 L. Ed. 583; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 69 L. Ed. 909; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 73 L. Ed. 147; *Illniois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 86 L Ed. 371; *Peoples Natural Gas Co.* v. *Public Serv. Commission*, 270 U. S. 550,

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[2] (Added herein and due notice given Appellee thereof.)

70 L. Ed. 726; *Illinois C. R. Co.* v. *De Fuentes*, 236 U. S. 157, 59 L. Ed. 517; *Milk Control Bd.* v. *Eisenberg Farm Products*, 306 U S. 346, 83 L. Ed. 752.

5. As to the Full Faith and Credit Clause, see, especially, *Fauntleroy* v. *Lum*, 210 U. S. 230, 52 L. Ed. 1039; *Huntington* v. *Attrill*, 146 U. S. 657, 36 L. Ed. 1123.

6. Under these decisions as to the Commerce Clause and the Full Faith and Credit Clause, this privilege tax under Section 9696-135 could not be recovered from Finance, quo ad that done, because thereasto Mississippi was absolutely without power. Compare *Freeman* v. *Hewit*, 329 U. S. 249, 91 L. Ed. 265. So that assuming the tax imposition, quo ad interstate commerce and full faith and credit, thus to void, Mississippi could not sue upon such void statute and recover thereon a valid judgment, enforcible in this Court, as against the claim of deprivation of property without due process. Compare *Wolf* v. *Colorado*, 338 U. S. 25, 93 L. Ed. 1782; *Douglas* v. *Jeanette*, 319 U. S. 157, 87 L. Ed. 1324; *Hood* v. *Du Mond*, 336 U. S. 525, 93 L. Ed. 965. See, also, *Mississippi Baptist Hospital* v. *G. R. Holmes*, on Suggestion of Error, — Miss. —, 56 So. 2d — (Adv. Sheets).

7. We have, as hereinabove stated, collected in Appendices 4 and 5 and quoted from decisions of this Court, illustrating the applicability and again invite such attention thereto as this Court may deem appropriate.

Jurisdiction, with deference, exists here (a) under the Due Process Clause; and (b) as supplemental thereto under the Commerce Clause and the Full Faith and Credit Clause, under both of which this Section 9696-135 as enforced by the Supreme Court of the State of Mississippi herein has been condemned.

The importance of these questions appears by the multitude of cases now reaching Mississippi's Supreme Court and the necessity for a correct decision hereasto lead us to

append to the application a prayer that if appeal were not proper, then certiorari should be considered and granted. Therefore, we respectfully ask the jurisdiction be noted on appeal but if not, that certiorari be granted, this being a suitable case under the Rules of this Court therefor.

WHEREFORE, it is respectfully submitted that jurisdiction here is in virtue of (a) the Due Process Clause, and (b) the Commerce Clause and the Full Faith and Credit Clause as an incident to the protection of a citizen against taking property without due process under a void law.

Respectfully,

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APPENDIX 1

Hays Finance Co. v. *Bailey,* Nov. 12, 1951, Miss., 54 So. 2nd 727:

"The State Tax Collector instituted two actions against appellant, one to recover $2,000 for the privilege of lending money at a greater rate of interest than 15% per annum for the year 1949, and the other for the same amount for such privilege for the year 1950, as imposed by *Section 9696-135* Cumulative Supplement of 1950 to Mississippi Code of 1942, and for 50% damages on the amount of such tax for failure to pay the same, as imposed by Section 9696-206 of said Supplement. The defendant defended both actions on the ground that it was a broker and not a moneylender and that it had paid the tax imposed by Section 9696-115 of said Supplement for the privilege of doing business as a broker. The cases were combined and tried together by agreement in the lower court, and it is agreed they may be so heard and decided here. The lower court awarded a judgment for $6,000 against defendant in the two cases, *thereby adjudicating defendant was a moneylender and not a broker,* from which this appeal is taken.

"*The matter was heard upon an agreed statement of facts and a deposition. The facts are not in dispute.*

"We have carefully examined and considered them and have diligently tried to ascertain the principles of law applicable to them. *We have been unable to detect any material difference between the facts of this case and the facts in Alt v. Bailey, Miss., 52 So. 2d 283, which would produce here a result different from that reached in the Alt case. We think that the case is decisive here and calls for an affirmance of this case.*

"Affirmed." (Emphasis ours.)

APPENDIX 2

Hays Finance Co. v. Bailey, On Suggestion of Error, Jan. 7, 1952, Miss., 56 So. 2d 76 (Adv. Sh.):

"On this suggestion of error appellant raises, for the first time in this case, the proposition that the judgments affirmed by our original opinion are in alleged violation of the interstate commerce clause of the United States Constitution. Aside from the fact that the effect of the original opinion herein, and the earlier case of Alt v. Bailey, 1951, 211 Miss. 547, 52 So. 2d 283, was to find that appellant, the Mississippi taxpayer, *was loaning its money in a purely intrastate, local activity, the interstate commerce issue was not assigned as error on this appeal, or argued when the case was submitted. It is a well established rule of procedure under the numerous decisions of this Court that new points made and presented for the first time on a suggestion of error, will not be considered unless an exceptional reason is shown, and we find that no such reason exists here.* Owen v. State, 1945, 197 Miss. 561, 570, 19 So. 2d 822, 20 So. 2d 95; Mississippi Oil & Gas Board v. Superior Oil Co., 1947, 202 Miss. 139, 30 So. 2d 589, 32 So. 2d 200; Delta Cotton Oil Co. v. Elliott, 1937, 179 Miss. 200, 217, 172 So. 737, 174 So. 550. *We find no merit in the other points raised in the suggestion of error.*

"Suggestion of Error Overruled." (Emphasis ours.)

APPENDIX 3

HAYS FINANCE COMPANY, INC.

vs.

MRS. THOMAS L. BAILEY

Opinion of Supreme Court on Motion

February —, 1952.

ALEXANDER, *Justice:*

The appellant has moved that this cause, which has heretofore been decided upon appeal and upon Suggestion of Error, be remanded to the docket for hearing and decision in banc. It is asserted that the judgment herein is not a final judgment of this Court, citing Title 28 U. S. C. A., Section 1257, Chapter 646, 62 Stat. 929. Anxiety is expressed as to the application of Gorman v. Washington University, 316 U. S. 98, 86 L. Ed. 13.

Putting aside any consideration of our duty to hear this motion at this stage, we take cognizance thereof in view of the implications of the foregoing citations.

At the time this cause was decided and judgment entered, and at the time judgment was entered overruling the Suggestion of Error therein, this Court was composed of six Judges, who, under Section 149A of the Constitution of 1890, implemented by Rule 34 of this Court, sat in two divisions of three Judges each. This cause was decided finally by Division B without dissent.

In Gorman v. Washington University, supra, the Court was construing the Missouri Constitution which contained a proviso that a cause pending in a division of the Missouri Supreme Court shall, when a judge of a division dissents from an opinion therein, or when a Federal question is involved, be transferred to the court for its decision, on application of the losing party. Rule 24 of that Court authorizes the transfer by motion of a cause pursuant to the provisions of the Constitution, from either division to the Court in banc. It was held that this case therefore was one which, after disposition of the cause by the division, could, upon application, be transferred to the full Court for review.

Under our Constitution and the rules and practice of this Court, a case in a division may be transferred to the full Court upon its own motion but never on the motion of a party litigant. Therefore, there is no right in the appellant to require such submission. Hudson v. Gulf Refining Company, 202 Miss. 331, 30 So. 2d 66, 421. An affirmance of a case by an equally divided court is a judicial precedent. Robertson v. Miss. Valley Company, 120 Miss. 159, 81 So. 799.

It is immaterial that, since the decision of this case, the Legislature has ratified an amendment to our Constitution increasing the number of Judges to nine. All judgments entered herein antedated the adoption of such amendment.

We hold therefore that the decision of Division B is the final decision of this Court, and that the appellant has no right to require a submission to the entire Court as now constituted. Section 149A of our Constitution provides that: "each division shall have full power to hear and adjudge all cases that may be assigned to it by the court." The exception as to the finality of such judgment is found only "In event the judges composing any division shall differ as to the judgment to be rendered, in any cause, or in event any judge of either division, within a time and in a manner to be fixed by the rules to be adopted by the court, shall certify that in his opinion any decision of any division of the court is in conflict with any prior decision of the court or of any division thereof, the cause shall then be considered and adjudged by the full court or a quorum thereof." As stated above, neither of these exceptions are found to have existed in the instant case.

We hold, therefore, that the decision and judgment herein is, insofar as this Court is concerned, a final judgment rendered "by the highest court of a state in which a decision could be had." However, this motion has been considered by the Court in banc since separate hearings by divisions have now been discontinued.

MOTION OVERRULED

McGHEE, *C. J.* and ROBERDS, HALL and KYLE, *JJ.*, concur.

APPENDIX 4

Applicability of Due Process Clause

Finance takes cognizance of *Woodson v. Hopkins*, 85 Miss. 171, 37 So. 1000, but note Chapter 77, Laws of Mississippi 1873 whereunder in writing any rate of interest might be contracted for, save as to decedents and some persons under disability. This was later repealed by Chapter 168, Laws of 1875. Compare *Commonwealth Finance Co. v. Livingston*, La. App., 12 So. 2 ' reviewing Louisiana statutes; see, also, *Home Finance Co., Inc.* v. *Padgett*, La. App., 54 So. 2d 813. And also of *Rodge v. Kelly*, 88 Miss. 209, 40 So. 552, wherein somewhat cognate questions were discussed and in that decision a Mississippi statute was declared unconstitutional under the Fourteenth Amendment as to certain aspects not here present. In *State v. Rombach*, 112 Miss. 737, 73 So. 731, certain Federal questions were specifically raised as to the prototype of Section 9696-135 and there discussed and determined by Mississippi's court but no appeal was to this Court taken. Therein one Frank Rombach was a resident of Oklahoma while his brother, Ed, was doing business in Canton, Mississippi, and thus, quo ad that business, subordinate to Mississippi's police and taxing powers, and yet as to Ed, the opinion specifically declared, 73 So. 732:

> "It is alleged in the bill that the business sought to be taxed 'is the joint business of said Frank T. and Ed. Rombach, in that the said Ed. Rombach is the manager and agent of his brother.' If Ed. Rombach is simply the manager for and agent of his brother, and the business does not belong to him, he is not liable for the tax. We will reverse and remand the case generally, however, in order that the state may amend the bill in this particular, should it see fit so to do."

Thus specifically vouchsafing Frank Rombach the right to operate and relieving the agent therein from responsibility hereasto. If Finance had assumed to do a local business at Jackson and thereat in this business loaned money at a rate of interest in excess of 20%, we would not have appeared

before this Court, recognizing the well-settled law thereasto. Compare *Griffith* v. *Connecticut*, 218 U. S. 563, 54 L. Ed. 1151; Annotations, 140 *A. L. R.* 1037, 125 *A. L. R.* 743, 93 *A. L. R.* 209, and 69 *A. L. R.* 581.

When a Federal question is involved, this Court is, under cases too numerous to cite and too well-settled to be disputed, the judge both of the law and of the facts, quo ad the transaction whereasto the claimed right is, *Norton Co. v. Department of Revenue*, 340 U. S. 534, 95 L. Ed. 517, and when the tax is assumed to be imposed by the State where its jurisdiction is not, a contravention of the Fourteenth Amendment is. Compare *Frick v. Pennsylvania*, 268 U. S. 473, 69 L. Ed. 1058; *Treichler v. Wisconsin*, 338 U. S. 251, 94 L. Ed. 37; *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428, 95 L. Ed. 1078; *Standard Oil Company v. Peck*, No. 184, October Term, 1951, 20 LW 4113.

In this connection, precedently Mississippi's court had uniformly conceded the right of individuals thus to contract. Compare *Greenlee v. Hardin*, 157 Miss. 229, 127 So. 777, 71 A. L. R. 741; *Abraham v. Friendly Finance Co. of Biloxi*, 205 Miss. 71, 38 So. 2nd 323; *Tower Underwriters, Inc. v. Lott*, 210 Miss. 389, 49 So. 2nd 704.

As to the right to make a loan, law conforming, that persisted under the Constitution is as stated in *Colgate v. Harvey*, 296 U. S. 404, 80 L. Ed. 299, 311:

> "The right of a citizen of the United States to engage in business, to transact any lawful business, or to make a lawful loan of money in any state other than that in which the citizen resides is a privilege equally attributable to his national citizenship. A state law prohibiting the exercise of any of these rights in another state would, therefore, be invalid under the Fourteenth Amendment. * * *."

See, also, *Reiling v. Lacy*, D. C., Md., 93 Fed. Supp. 462.

After thus uniformly vouchsafing the right of private contract constitutionally guaranteed, compare *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 93; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. Ed. 832, inter se Mississippi's court has seen, at the instance of its tax collector, who has herein a

personal interest to the extent of 20% with limitation nevertheless (Section 9192), a new light whereunder that which was substantially and fundamentally protected inter partes is now substantially destroyed at the instance of the City when those acting in the business have insofar as this record goes shown no dissatisfaction with (a) the location of these contracts in Louisiana, and the application of its laws thereto; (b) the establishment of the broker-lender relationship.

The startling and disturbing invasion of that precedently deemed settled came within the decision of *Alt v. Bailey*, 211 Miss. 547, 52 So. 2nd 283, decided on May 7, 1951, which was assumed to be made applicable in this case by the State Supreme Court but without, we submit, any constitutional right so to integrate, and was in all things, quo ad these Mississippi residents and this Louisiana resident, acting for those in Mississippi who thus desired to borrow, perfectly valid.

Note the fundamental differences. In the *Alt* Case, the alleged broker in Mississippi did business in other states as a money lender and thereasto the State Supreme Court seemed to find certain indicia of alleged fraud which, with deference, were not (*Colgate v. Harvey*, 296 U. S. 404, 80 L. Ed. 299), but herein the facts as facts are stipulated and the evidence supplementing not in conflict therewith, and under such a record, by Section 9696-135, Mississippi's court was not privileged under the Constitution to integrate by presumption that which converted a valid note dated in Louisiana, solvable in Louisiana, in favor of Discount, into a fundamentally different obligation situsedin Mississippi where therethrough it was destroyed by making it illegal. Herein no such presumption may be, as was assumed to be had by the *Alt* case. *Houghton v. Burden*, 228 U. S. 161, 57 L. Ed. 780; *Dice v. Akron, Canton & Youngstown R. Co.*, No. 374, October Term, 1951, 20 LW 4120; and *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 55 L. Ed. 78, 80, wherein it is said:

> "That a legislative presumption of one fact from the evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the

law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. * * *."

But herein, to destroy a note perfectly valid on its face may not constitutionally be, for thereasto no valid reason is. Compare *Tot v. United States,* 319 U. S. 463, 87 L. Ed. 1519, 1524, wherein it is said:

"* * * But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits.

"The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, *if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.* This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." (Emphasis ours.)

And that presumption of law violation, illegality, so assumed to be drawn by Mississippi's court in aid of its taxing

power thus contravenes. The case of *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 55 L. Ed. 78, has been approved as late as *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 89 L. Ed. 1372, 1380, and concurring opinion, *Oyama v. California*, 332 U. S. 633, 92 L. Ed. 249. *Tot* v. *United States*, 319 U. S. 463, 87 L. Ed. 1519, approved in *United States v. Fleischman*, 339 U. S. 349, 94 L. Ed. 906, concurring opinion, *Krulewitch v. United States*, 336 U. S. 440, 93 L. Ed. 791, *Bollenback v. United States*, 326 U. S. 607, 90 L. Ed. 350, and *Kotteakos v. United States*, 328 U. S. 750, 90 L. Ed. 1557.

These underlying mandates from this Court, with deference, in this cause were fundamentally violated when the alleged differentiations assumed to be presumed in the *Alt* Case were hereasto made applicable.

The Mississippi Court decided *Alt v. Bailey*, 211 Miss. 547, 52 So. 2nd 283, on May 7, 1951, postdating by years the cases vouchsafing Finance its right to act as a broker. Mississippi's Court has assumed to declare such a change in judicial opinion as is here wrought an impairment of contract obligations. Compare *Wisconsin Lumber Co.* v. *State*, 97 Miss. 571, 54 So. 247; but see *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. Ed. 91.

The *Alt v. Bailey*, supra, opinion is annexed as Appendix 6 hereto. This suit was brought not by a party to the contract as in the other cases, but by the City to collect a highly penal privilege tax upon Alt as an alleged money lender, and invalidate all securities therein utilized, Sec. 36, Mississippi Code of 1942. The Mississippi Court assumed to apply the *Alt* opinion to this cause, but, with deference, thereasto constitutionally could not so do. The assumed differentiation of *Tower Underwriters, Inc. v. Lott*, 210 Miss., 289, 49 So. 2nd 704, authorizing such brokerage agreements, and the *Alt* Case, wherein they were assumed to be condemned, and this case are many, and, with deference, the assumed distinctions in the *Alt* Case are constitutionally unsound, quo ad the facts herein stipulated. In the case at bar there are the following fundamental differences with the *Alt* decision:

(a) The city sued exclusively upon the alleged liability imposed by Section 9696-135 upon appellant as a "money

lender" seeking to destroy the contracts as being but pretenses and subject to Mississippi's jurisdiction exclusively. However, appellee conceded the execution of the several instruments annexed as exhibits with the form wherein they were and that pursuant thereto the business was done wherein Discount was the payee of all notes and the sole collector of all interest. In these Finance concededly did not participate.

(b) Finance acted as broker and conformed to the written contracts retaining as that alone whereto it was entitled the agreed scale of brokerage whereto presumptively each customer voluntarily consented and whereasto, insofar as this record shows, customer number one has not made any protest or assumed to aver illegality in that by him contractually agreed to.

(c) There is no stipulation as to the unreasonableness of the charges made for Finance's services, if in truth there could so be. Note that these objections are urged not by the persons affected but by a tax gatherer.

(d) No stipulation shows that Finance had the ability to lend a single dollar belonging to it individually.

(e) The stipulation wholly fails to show that Discount pursued any business other than making loans both to Finance and to others receiving as its sole compensation the return of the principal with the interest added.

(f) No bad faith or intention to defraud by hiding behind these contracts is averred and no proof, quo ad that status, even attempted. *Dice v. Akron, Canton & Youngstown R. Co.*, No. 374, October Term, 1951, 20 LW 4120; *Houghton v. Burden*, 228 U. S. 161, 57 L. Ed. 780. But it may be said that Mississippi's court urged, quo ad Finance and Discount, valid reasons distinguishing the *Tower Underwriters* Case, supra. Let's see:

(1) The judge said, 52 So. 2nd 287:

> "This case is clearly distinguishable from the case of Tower Underwriters, Inc. v. Lott, Miss., 49 So. 2nd 704. * * *."

So we thus have as law in Mississippi that determined in the *Tower* Case, if perchance that should be applicable to this

contract. No attack upon the *Tower* Case is made and in its entirety it appears as Appendix 7 hereto, and the more pertinent parts therein for emphasis are underscored.

(2) Mississippi's Court then said, 52 So. 2nd 287:

> "• • • In the Tower case the loans were actually made in Bogalusa, Louisiana. When the borrower signed the papers in the office of the Tower Underwriters, Inc., at Greenwood, all he received was a draft on the Louisiana Loan Discount Corporation. The borrower was then required to forward the draft to Bogalusa, Louisiana, for payment, and the draft was paid by the Louisiana Loan Discount Corporation at Bogalusa. • • •."

Both in the *Tower* case and in the *Alt* case, the borrower through the broker executed a promissory note dated in Louisiana for principal and interest and this note was forwarded from Mississippi to Louisiana where the payee accepted and received it, and therein and thereasto was interstate commerce whereover even if there were illegality therein the states were powerless under the Commerce Clause until Congress gave its consent hereasto. Compare *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 31 L. Ed. 700; *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128; *In re Rahrer*, 140 U. S. 545, 35 L. Ed. 572; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U. S. 334, 81 L. Ed. 270. Note that this Section 9696-135 imposes a privilege tax prohibiting until payment engaging in the business which here is interstate commerce. Compare *Robbins v. Taxing District*, 120 U. S. 489, 30 L. Ed. 694; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. Ed. 649; *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. Ed. 877. Being thus thereasto interstate commerce, the incidents thereto essential to make such commerce effective likewise lay beyond State power. Compare *Spector Motor Service v. O'Connor*, 340 U. S. 602, 95 L. Ed. 573; *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555, 69 L. Ed. 439; *Interstate Oil Pipe Line Co. v. Stone*, 337 U. S. 662, 93 L. Ed. 1613. Therein those incidental acts reasonably requisite to effectuate commerce as incidents were held as a part thereof. It will be doubtless urged that the Commerce

Clause came too late, as contended by the State Court in its opinion, but, with deference, where under the Fourteenth Amendment due process is invoked, thereby those fundamental rights essential thereto are brought here for review. Compare *Douglas v. Jeanette*, 319 U. S. 157, 87 L. Ed. 1324, and authorities reviewed infra.

(3) Justice Kyle, with deference, misconceived as to the drafts held appropriate in the *Tower* case. The loan there was $300 and said Mr. Chief Justice McGehee, 49 So. 2nd 705:

> "• • • He was thereupon given a draft drawn by said corporation on the nonresident corporation for the sum of $300, and a second draft similarly drawn in his favor for $53.78, which he then and there endorsed and delivered to the appellant resident corporation, • • •.
>
> • • •
>
> "The draft given to the borrower for $300 was cashed by him at a local bank within less than thirty minutes from the time he applied for the loan, and he then went on his way. In other words, the papers were not submitted to the nonresident corporation for approval between the time of their execution and the borrower's receipt of the money. • • •."

Here, under the stipulation, the borrower might have cashed this draft with either Finance or at any point which he desired, the stipulation specifically reciting, R. 9:

> "• • • The customer can get the draft cashed elsewhere, but as a general rule the defendant will cash it for him upon the customer's endorsing the draft; • • •."

And in *Real Silk Hosiery Mills v. Portland*, 268 U. S. 325, 69 L. Ed. 982, 985, this Court specifically said:

> "• • • And we are unable to see that the burden on interstate commerce is different or less because they are paid through retention of advance partial payments made under definite contracts negotiated by them. • • •."

Applied consistently and as late as *Breard v. Alexandria*, 341 U. S. 622, 95 L. Ed. 1233. See, also, *Freeman v. Hewit*, 329 U. S. 249, 91 L. Ed. 265, 271, where this Court said:

> "• • • In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. Southern P. Co. v. Arizona, 325 U. S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515; Morgan v. Virginia, 328 U. S. 373, 90 L. Ed. 1317, 66 S. Ct. 1050, 165 A.L.R. 574. • • •."

Such drafts are but incidents therein and thereto whereasto Mississippi is without power. Compare *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 31 L. Ed. 700. Finance received as broker for Discount the note forthwith forwarded and likewise the draft drawn on Discount at Baton Rouge and both unconditionally guaranteed by Finance, making them, quo ad the borrower, cash available to such borrower but with the right to draw a line, as was pointed out by this Court in *Lawrence v. State Tax Commission*, 286 U. S. 276, 76 L. Ed. 1102. Appellant did not take a note from the borrower payable to itself at Jackson and having thus done rediscount that note to Discount, but, with power to contract, did as in the record set forth, and in so doing Discount could when it received these notes treat them as having been received as at the date of execution under the doctrine of relation back. Compare *United States v. Anderson*, 194 U. S. 394, 40 L. Ed. 1035; 53 *C.J.*, "Doctrine of Relation", 1185. And when it thus did, it assumed to collect and did collect the interest on the principal from the date of the note, and having thus done and treated this interest as its own, therewith the city might not interfere having precedently received due compensation from Finance for the doing of a brokerage business included within the license which the city issued. With the utmost deference, Justice Kyle simply missed the road completely when he

assumed to extend in virtue of this fact the State's power of taxation to that whereto it was constitutionally inapplicable. A person in need of $10 may have to have it forthwith and interstate commerce exists for such a one as well as for those borrowing millions. Mississippi's court's anxiety for the underprivileged thus herein must disappear, for this is a tax gatherer's suit and not on behalf of those allegedly oppressed, who seem to have been and to be content with that done. Let the Court be mindful of that said in *Chicago Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 49 L. Ed. 1031, 1038, thus:

> "* * * But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, * * *."

(g) Justice Kyle further said in the *Alt* Case, 52 So. 2nd 287:

> "* * * In the case we now have before us, the borrower signed the draft and received the money in the offices of the Acme Loan Service in Jackson. The loan, as far as he was concerned, was actually completed in Jackson. * * *."

But the contract of the parties in writing is before the Court for construction and Mississippi's Court in *Bradley v. Howell*, 161 Miss. 346, 134 So. 843, 844, said:

> "The province of courts in respect to contracts extends not a single step farther than the enforcement thereof as made by the parties, and courts must be careful that they go no farther. If the court should fail in enforcement, it would be only failure or omission; but, if upon any procedure or pretext the court should go farther and make a contract between parties which they themselves never made or agreed upon and thereupon enforce the same as made by the court, this would be oppression."

And the Judge concedes that this was only insofar as the borrower was concerned, overlooking completely, wherefor

he had no constitutional warrant, the relationship between Finance and Discount.

(h) Justice Kyle, in the *Alt* case, supra, then refers to the fact that in the *Tower* case, supra, that corporation did not have adequate funds and there was evidence in the *Alt* case that there were adequate funds possessed by those who were operating as brokers. Two considerations: (1) In the present record with the burden of proof upon the City, it wholly failed to show that Finance could make these loans on its own credit. *"De non apparentibus et non existentibus eadem est ratio"* ("Where the Court cannot take judicial notice of a fact, it is the same as if the fact had not existed"), *Broom's Legal Maxims*, p. 163; 26 *C. J. S.* 712. (2) Just as in the Tower case, supra, the bank in Louisiana was the lender by reason of its plethora of funds, so here there being no stipulation or proof. *"Omnia praesumuntur rite et solenniter esse acta"*, *Broom's Legal Maxims*, 165, 942, 950, 951; 57 *C. J. S.* 492. *"Benignae faciendae sunt interpretationes, propter simplicitatum laicorum, ut res magis valeat quam pereat"*, *Broom's Legal Maxims*, 540; 10 *C. J. S.* 344. So, appellee not having proved appellant's opulence nor Discount's poverty may not hereasto in any way assign this section of Justice Kyle's opinion.

(i) Further, in the *Alt* case, the Justice quotes *State v. Abbott Loan Service*, Tex. Civ.. App., 195 S. W. 2d 416, 419, and therefrom says, 52 So. 2d 287:

> "* * * * * * it must appear that the extra charge was made in good faith for so negotiating the loan and such a charge may not be made where the party charging the commission is merely lending his own money. * * *.'"

And in this case, Finance was not "loaning its own money" but guaranteeing, for a consideration, unto Discount that John Doe, the borrower, would well and truly pay that of Discount borrowed in manner and form as the note did provide, and herein there is not one iota of evidence that Finance had that amount requisite to supply the obvious urgent need at Jackson for the capital existent at Baton Rouge, a large industrial center whereat this Court may

judicially know that oil is a major industry and wherefrom much wealth is.

(j) Justice Kyle in the *Alt* case quoted 55 *Am. Jur.*, Par. 16, p. 334, thus, 52 So. 2d 287:

> "• • • 'And where the actual lender, in order to evade the statute, pretends to act as an agent or broker and exacts a commission for his supposed service in procuring the loan from a third person, the court, upon proof of the deceptive character of the transaction, will declare it usurious. The fact that a borrower is required or induced to go through the form of employing an agent who is in reality acting for the lender, or even to execute an instrument in connection with the loan, containing an allegation that the intermediary through whom it is negotiated is his agent, will not alter the case, so as to prevent the payment of a commission to him from constituting usury.' "

But in this case the bonus paid is not attacked, the services rendered are not specifically delineated, and the money was that of Discount, not Finance, insofar as this record discloses.

Absent all of these factors, at the instance of a tax gatherer Mississippi's court presumed, contrary to the well-established rule, that it could subordinate this lending business situsd without question at Baton Rouge, into Mississippi and integrate into the notes, whose terms were plain and explicit, a provision that converted them into illegalities under Section 36, Mississippi Code of 1942.

Quo ad notes payable to Discount at Baton Rouge, Discount received, while held in Louisiana, no protection whatsoever from Mississippi and being thus non-resident no Mississippi court could have in it rendered affecting Discount a personal judgment. Compare *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, approved as late as *Standard Oil Co. v. New Jersey*, 341 U. S. 328, 443, 95 L. Ed. 1078, 1090; *Mullane v. Central Hanover B. & T. Co.*, 339 U. S. 306, 311, 94 L. Ed. 865, 872. And there being on each note the maker, a Mississippian, the guarantor, a Mississippian, and the payee, a nonresident, any personal proceeding in

Mississippi would be a fraud upon the rights of Discount, *Sivley v. Summers,* 57 Miss. 712, and no cancellation thereof therein would be potentially possible. Compare *Shields v. Barrow,* 58 U. S. 130, 17 How. 130, 15 L. Ed. 158, approved in *United States v. Aetna Casualty & Surety Co.,* 338 U. S. 366, 382, 94 L. Ed. 171, 186. So, when the Mississippi court assumed to adjudge these notes the property of Finance and thereby under Section 36, Mississippi Code of 1942, infected them as business done in Mississippi with total illegality (if Mississippi might so do), these notes became in Discount's hands mere scraps of paper whereon by reason of the illegality thus integrated Discount could not sue in Mississippi (a) the maker and (b) the guarantor, and thus the entire movement between Mississippi and Louisiana hereasto would be thus condemned though under Mississippi Law Discount was not required to qualify within Mississippi. Compare *Yellow Manufacturing Acceptance Corporation v. American Oil Co.,* 191 Miss. 757, 2 So. 2d 206, 140 A. L. R. 1029, affirmed, *C. I. T. Corporation v. Stone,* 317 U. S. 591, 87 L. Ed. 484.

Compare *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.,* 292 U. S. 143, 78 L. Ed. 1178, wherein the Pine Land Company operated a plantation within Mississippi but maintained a business office at Memphis where the policy sued on was issued. Recovery under Tennessee's law might not have been but was permitted under Mississippi's law and that whereasto the complaint was originated in Mississippi, and this Court specifically noted, p. 1181:

> "• • • Here performance at most involved only the casual payment of money in Mississippi. • • •."

And yet under the Due Process Clause held Mississippi's judgment enforcing the obligation pursuant to Mississippi's law a contravention of the Constitution, this Court saying, p. 1181:

> "The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (Hooper v. California, 155 U. S. 648, 39 L. Ed.

297, 15 S. Ct. 207, 5 Inters. Com. Rep. 610; Orient Ins. Co. v. Daggs, 172 U. S. 557, 565, 566, 43 L. Ed. 552, 555, 556, 19 S. Ct. 281; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 398, 399, 44 L. Ed. 1116, 1123, 1124, 20 S. Ct. 962); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. New York L. Ins. Co. v. Head, 234 U. S. 149, 58 L. Ed. 1259, 34 S. Ct. 879; Aetna L. Ins. Co. v. Dunken, 266 U. S. 389, 399, 69 L. Ed. 342, 349, 45 S. Ct. 129. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Ins. Co. v. Dick, 281 U. S. 397, 407, 408, 74 L. Ed. 926, 933, 934, 50 S. Ct. 338, 74 A. L. R. 701."

Compare *Osborn v. Oslin*, 310 U. S. 53, 84 L. Ed. 1074; *Griffin* v. *McCoach*, 313 U. S. 498, 85 L. Ed. 1481; *Home Insurance Co. v. Dick*, 281 U. S. 397, 74 L. Ed. 926, 74 A. L. R. 701; *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 69 L. Ed. 342; *New York Life Ins. Co. v. Head*, 234 U. S. 149, 58 L. Ed. 1259; and *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U. S. 178, 81 L. Ed. 106.

Herein each customer is assumed to have read the agreements, the drafts and the note making solely solvable these obligations in Louisiana and each customer to have consciously claimed thereunder and in accordance therewith and not have sought to subvert that thereby done. Inter se, each party was bound by the provisions therein contained. Compare *Germania Life Ins. Co. v. Bouldin*, 100 Miss. 660, 56 So. 609.

In *Dixie Brokerage & Guaranty Co. v. Bailey*, — Miss. —, 55 So. 2d 438 (Adv. Sh.), suggestion of error overruled January 28, 1952, Mississippi's Court made again the same ruling and upon a stipulated record, Justice Lee sustained this tax where Discount was involved, but, with deference, when the Constitution is involved this Court is the judge both of the facts and of the law and cannot be bound by those State decisions which assume to avoid constitutional obli-

gations and guaranties by assuming to make only a determination of a fact, and this decision but emphasizes the fundamental error in failing to grasp that the loan was made exclusively by Discount whereasto Mississippi had no jurisdiction and could not, quo ad Discount, completely invalidate that whereto competent parties had consciously contracted.

Wherefore, as between the borrowers in Mississippi in need of funds and Finance, a duly licensed broker in the City of Jackson, and Discount, a duly organized banker at Baton Rouge, the judgment of the Supreme Court of the State of Mississippi holding Section 9696-135 valid, and when

(a) The facts were all stipulated and there was not any proof that the borrowers did not borrow pursuant to their contractual right in manner and form as the stipulated facts show; and

(b) Finance operated solely as a money broker, exacting for itself alone a compensation contractually fixed between the borrower and itself—whereto Discount was in no way a party but a total stranger—and received this amount thus agreed upon without participation directly or indirectly with Discount—to whom it was a total stranger; and

(c) Discount did business as a banker exclusively at Baton Rouge with no qualification within Mississippi and without agents or representatives there, and therein loaned its money at a rate of interest in strict conformity to law under obligations made in Louisiana, solvable in Louisiana and actually there solved, and took as that whereto it was alone rightfully entitled, the interest expressly contracted for, and this admeasured its total participation; and

(d) This method of doing business was open, above board, with no concealment, and has not been in any way directly challenged by any actual participant therein; and

(e) There is not one iota of proof that Finance participated in the interest or that Discount participated in the brokerage; then said judgment of the Supreme Court of the State of Mississippi so interpreting said statute violated the Fourteenth Amendment as to the Due Process Clause, when

(1) Without proof of any wrongdoing it took from the borrowers the right to thus borrow utilizing therein a

broker to them satisfactory, at a compensation by them deemed appropriate; and

(2) It deprived the broker of the right to ply his trade under a written contract on its face perfectly lawful, wherefrom the broker earned that which is not shown to have been unreasonable or unjust as a brokerage; and

(3) Discount was deprived of the right to realize (a) on the unconditional guarantee made by Finance, (b) on the note executed by the borrower, and (c) its right in due course to contract.

All of this by the judgment of the Supreme Court of the State of Mississippi was wrongfully assumed to be integrated into the business done by all three. The law of Mississippi was not applicable further than to situs it in Louisiana and the law of Louisiana controlled, especially is this true when without precedent payment Mississippi undertook to make all of this business absolutely illegal. Compare Appendix 8 whereunder the tax statutes as to privilege licenses are quoted in full but may be epitomized thus:

Section 9696-03 makes the obtaining of the license before business is begun a condition precedent to the right to do it.

Section 9696-115 prescribes the amount as to brokerage.

Section 9696-135 prescribes the tax as to money lenders.

Section 9696-208 specifically provides:

> "Upon the receipt of the application herein required, and payment of the amount shown thereby to be due for the privilege to be exercised, the officer to whom said application is made shall determine if the application is in proper form, and if the correct amount be tendered, and may require the applicant to furnish such other and further information as in his opinion is necessary to ascertain the correct amount of tax due. * * * ."

Wherewith Finance presumptively complied when its brokers license was issued by the City.

Section 9696-214 prescribes that this license is a personal privilege and not assignable; and any person violating is

guilty of a misdemeanor with fine and imprisonment possible, Section 9696-228.

While as to municipalities these sections have not been construed, when precedently applicable to the state in almost the identical form, they were so construed by Mississippi's court and this Court and these interpretations were integrated thereinto when these reenactments were made as to municipalities.

APPENDIX 5

Applicability of Commerce Clause and Full Faith and Credit Clause

In *Freeman v. Hewit,* 329 U. S. 249, 91 L. Ed. 265, 272, this Court declared:

> "These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense. * * *."

In *Wolf v. Colorado,* 338 U. S. 25, 93 L. Ed. 1782, 1785, this Court said:

> "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

"To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of 'inclusion and exclusion'. Davidson v. New Orleans, 96 US 97, 104, 24 L ed 616, 619. This was the Court's insight when first called upon to consider the problem; to this insight the Court has on the whole been faithful as case after case has come before it since Davidson v. New Orleans was decided."

In *Douglas v. Jeanette*, 319 U. S. 157, 87 L. Ed. 1324, 1328, this Court said:

"We have repeatedly held that the Fourteenth Amendment has made applicable to the states the guaranties of the First. Schneider v. Irvington, 308 U. S. 147, 160, note 8, 84 L. ed. 155, 164, • • • and cases cited; Jamison v. Texas, 318 U. S. —, ante, 629 • • •."

Approved in *Stefanelli v. Minard*, No. 2, October Term, 1951, 96 L. Ed. 99 (Adv. Sh.); see, also, *Rochin v. California*, No. 83, October Term, 1951, 96 L. Ed. 154 (Adv. Sheets).

With deference, our view is admirably expressed in *Johnson v. Dye*, CCA 3, 175 Fed. 2nd 250, reversed 338 U. S. 864, 94 L. Ed. 530, wherein it is said, p. 254:

"• • • it is the modern view, and, we feel, the correct one, that where the right protected and guaranteed under the Bill of Rights (Amendments I to VIII) of the United States Constitution is 'basic' and 'fundamental' to the rights of life and liberty, recognized and guaranteed by the Constitution of the United States, then the due process clause of the Fourteenth Amendment prohibits a state from abridging or denying the right in question."

And Finance under the Commerce Clause and the Full Faith and Credit Clause could not be prohibited from doing that done, especially if Finance transacted this business and had the same completed as interstate commerce in its entirety when the tax imposition was sought. It might have been contended that Finance would not consummate the interstate commerce, but when tax imposition was made by Mississippi the commerce had become fate accompli. Compare *Terminello v. City of Chicago*, 337 U. S. 1, 93 L. Ed. 1131.

In *American Communications Association v. Douds*, 339 U. S. 382, 94 L. Ed. 925, 928, Syl. 12 states:

> "Congress, not the courts, is primarily charged with the determination of the need for regulation of activities affecting interstate commerce. If such regulation unduly infringes personal freedoms guaranteed by the First Amendment, the Supreme Court must declare the statute invalid. But in so far as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, the Supreme Court is in no position to substitute its judgment as to the necessity or desirability of the statute for that of Congress."

See, also, "Annotation", 94 L. ed. 973. Compare *Breard* v. *Alexandria*, 341 U. S. 622, 95 L. ed. 1233; *Nippert* v. *Richmond*, 327 U. S. 416, 90 L. ed. 760; *Hood* v. *Du Mond*, 336 U. S. 525, 93 L. ed. 965.

In *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, 92 L. ed. 1633, 1634, Syl. 1 reads:

> "A state appellate court may be found to have passed upon the issue of constitutionality of a tax on a carrier's gross receipts in transportation between state points over routes passing through other states, so as to warrant review by the Supreme Court of the United States, where, notwithstanding its statement that the question urged before it was 'not one of constitutional taxing power but of statutory construction', * * *."

We are not unmindful of *Wilson* v. *Cook*, 327 U. S. 474, 90 L. ed. 793, and herein no contention contra is.

Commerce was expanded appropriately to embrace not only tangibles but intangibles, when correlated as was herein done. Compare *United States* v. *South Eastern Underwriters Association*, 322 U. S. 533, 88 L. ed. 1440, approved in *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 94 L. ed. 1017, 1034; *Travelers Health Association* v. *Virginia*, 339 U. S. 643, 94 L. ed. 1154, concurring opinion, 1163.

In the Annotation to *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 94 L. ed. 920, 926, 929, the rule is thus stated:

> "The general rules as to what must appear in order to justify the United States Supreme Court in taking jurisdiction to review the decision of a state court were laid down by Justice Story, in Crowell *v.* Randell (1836) 10 Pet (US) 368, 9 L. ed. 458, where, after calling attention to the apparent existence of an erroneous impression regarding the matter, reviewing all the previous cases in which it had been made the subject of controversy, and stating that the period seemed to have arrived when the court should, with a view to closing future controversy upon the point, reaffirm the interpretation which had been constantly maintained in the earlier decisions, he said: "To bring a case within the twenty-fifth section of the Judiciary Act, it must appear upon the face of the record (1) that some one of the questions stated in that section did arise in the state court; (2) that the question was decided by the state court, as required in the same section; (3) that it is not necessary that the question should appear on the record to have been raised, and the decision made on direct and positive terms, ipsissimis verbis, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment; (4) that it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on

the record, that it did arise and was applied by the state court to the case.' "

For many years this Court disregarded opinions in the State court and made the Federal question depend upon the record. Herein the State acting for the city declared upon this statute as taxing that hereinbefore epitomized and which constituted per se as at now interstate commerce. Thereasto Mississippi's court adjudged that the state might under this statute as so construed take from Finance six thousand of its dollars and the judgment so doing was affirmed over a claim under the Fourteenth Amendment, and, with deference, it is submitted that the Fourteenth Amendment is operative not only to borrow from another bank per se but also per quod, in this, that when under the Commerce Clause the privilege tax is void as a law, it does not authorize the rendition of a judgment taking away from appellant that which is lawfully its. Compare *United States* v. *Lee*, 106 U. S. 196, 27 L. ed. 171, wherein those claiming to be in authority under the United States pleaded that authority as against the Lee title, otherwise perfect, and the adjudication was here that the Federal claim was a nullity and liability existed. Compare *Georgia Railroad & Banking Co.* v. *Redwine*, No. 1, October Term, 1951, wherein Redwine, assuming to act pursuant to Georgia's taxing power, proceeded against the railroad which hereasto claimed contract obligation impairment. Therein, Mr. Chief Justice Vinson said, 20 LW 4108, 4110:

" * * * It seeks to enjoin appellee from collecting taxes in violation of appellant's rights under the Federal Constitution. This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State. These decisions were reexamined and reaffirmed in Ex Parte Young, 209 U. S. 123 (1908), and have been consistently followed to the present day. This general rule has been applied in suits against individuals threatening to enforce allegedly *unconstitutional taxation*, including cases where, as here, it is

> alleged that taxation would impair the obligation of contract. * * *." (Emphasis ours.)

Thus that in the possession of Mrs. Bailey acting for the state is a void statute contravening the Commerce Clause and the Full Faith and Credit Clause, but nevertheless therewith she has taken through a state judgment appellant's money and under the Constitution this cannot be due process when the lawful rights of appellant are subordinate to the unlawful invasion by the State. The Commerce Clause and the Due Process Clause are in pari materia and when for construction here, quo ad a state privilege tax, the Due Process Clause inherently embraces an examination of the statute's validity.

Herein Discount gave to Finance a written authorization for transmission from Mississippi to Louisiana of notes wherefor return was to be of cash. In *Currin* v. *Wallace*, 306 U. S. 1, 83 L. ed. 441, 448, this Court said:

> "* * * Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. * * *."

Citing therefor, *Swift & Co.* v. *United States*, 196 U. S. 375, 49 L. ed. 518; *Dahnke-Walker Mill. Co.* v. *Bondurant*, 257 U. S. 282, 66 L. ed. 239; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. ed. 458; *Stafford* v. *Wallace*, 258 U. S. 495, 66 L. ed. 735; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, 69 L. ed. 583; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 69 L. ed. 909; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 73 L. ed. 147.

Currin v. *Wallace*, supra, is approved in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 91 L. ed. 1742, 1747; and *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349, 95 L. ed. 329, 333.

Compare *Rosenberger* v. *Pacific Exp. Co.*, 241 U. S. 48, 60 L. ed. 880, wherein there were liquor shipments whereasto Congress had given the right to the States to regulate, but therein the State sought to obstruct the incident as to

C.O.D. arrangements and though this was but an incident of commerce, thereasto this Court said, p. 883:

> "• • • (c) Because the power in interstate commerce shipments to make C.O.D. agreements, that is, agreements on delivery of the commodity shipped to collect and remit the price, is incidental to the right to make such shipments, and the commodities when so shipped do not come under the authority of the state to which the commodities are shipped under such agreements until arrival and delivery, and therefore any attempt on the part of the state to directly burden or prohibit such contracts, or prevent the fulfillment of the same, necessarily comes within the general rule and is repugnant to the Constitution of the United States."

Note *York Mfg. Co.* v. *Colley*, 247 U. S. 21, 62 L. ed. 963, 11 A.L.R. 611, wherein the right to erect and test were held such incidents as to preclude state action. See, also, the "Annotation", 11 *A.L.R.* 614.

Compare *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10, 73 L. ed. 147, 153, where this Court said:

> "Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among states. And a state statute that operates directly to burden any of its essential elements is invalid. Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; Shafer v. Farmers Grain Co. supra, 199 (69 L. ed. 914, 45 Sup. Ct. Rep. 481)."

In *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. ed. 458, 461, this Court said:

> "That such course of dealing constitutes interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle. Dahnke-Walker Mill Co. v. Bondurant, de-

cided December 12, 1921 (257 U. S. 282, ante, 239, 42 Sup. Ct. Rep. 106). In that case the facts disclose that a company organized in Tennessee, and carrying on business there, went into Kentucky, and, through an agent there bought wheat for shipment to company's mill in Tennessee. The state court held that the transaction was merely a purchase of wheat in Kentucky, and made the Tennessee Company amenable to the regulatory statutes of the state. This court rejected the conclusion of the state court, and held that the buying, no less than the selling, of grain, under such circumstances, was a part of interstate commerce, committed to national control by the Federal Constitution. Applying the principle of that decision, and the previous decisions of this court, cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the state could not regulate the business by a statute which had the effect to control and burden interstate commerce."

Compare *Dahnke-Walker Mill Co.* v. *Bondurant*, 257 U. S. 282, 66 L. ed. 239; *Crescent Oil Co.* v. *Mississippi*, 257 U. S. 136, 66 L. ed. 170; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 198, 69 L. ed. 914; *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 334, 69 L. ed. 982.

It will be noted that the State through the city lawfully licensed appellant as a broker, thus originating interstate commerce in accordance with the normal course. In *Joseph* v. *Carter & Weekes S. Co.*, 330 U. S. 422, 91 L. ed. 993, it was held:

"1. The commerce clause precludes the leveling of a tax under state authority upon the gross receipts of stevedoring companies from loading and unloading vessels employed in interstate or foreign commerce, or upon the privileges of conducting such business measured by those gross receipts. (Puget Sound Stevedoring Co. *v.* Tax Commission. 302 US 90, 82 L. ed. 68, 58 S. Ct. 72, reaffirmed.)

"2. The commerce clause is subject to no limitation other than may be prescribed by other provisions of the Constitution.

"3. Without Congressional action the words themselves of the commerce clause forbid undue interferences by the states with interstate commerce."

The transmission through the drafts from Jackson to Baton Rouge was just as requisite as was the stevedoring to moving these cargos in commerce. See, especially, *Spector Motor Service v. O'Connor*, 340 U.S. 602, 95 L. Ed. 573.

In *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 565, 69 L. Ed. 443, this Court said:

"The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done, and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial, and extends to whatever is necessary to the complete enjoyment of the right protected. * * *."

Compare *Binderup v. Pathe Exch.*, 263 U.S. 291, 68 L. Ed. 308.

In *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 91 L. Ed. 1742, 1747, it was said:

"Under the circumstances described by the Commission, it is clear that the sales in question were quite as much in interstate commerce as they would have been had the pipes of the petitioner crossed the state line before reaching the points of sale. * * *."

Citing therefor, which are, with deference, relied on herein: *Shafer* v. *Farmers Grain Co,.* 268 U.S. 189, 69 L. Ed. 909; *Lemke* v. *Farmers Grain Co.,* 258 U.S. 50, 66 L. Ed. 458; *Dahnke-Walker Mill. Co. v. Bondurant,* 257 U.S. 282, 66 L. Ed. 239; *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.,* 314 U.S. 498, 86 L. Ed. 371; *Currin* v. *Wallace,* 306 U.S. 1, 83 L. Ed. 441; *Peoples Natural Gas Co. v. Public Serv. Commission,* 270 U.S. 550, 70 L. Ed. 726; *Illinois C. R. Co.* v. *De Fuentes,* 236 U.S. 157, 59 L. Ed. 517; *Milk Control Bd. v. Eisenberg Farm Products,* 306 U.S. 346, 83 L. Ed. 752.

In *Union Brokerage Company v. Jensen,* 322 U.S. 202, 88 L. Ed. 1227, there was a reference to the right to brokers in commerce, not brokerage, but, with deference, it supports the view herein contended for.

Compare *Memphis Natural Gas Co.* v. *Stone,* 335 U.S. 80, 92 L. Ed. 1832; *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662, 93 L. Ed. 1613.

We reiterate that as precedently held Mississippi's court did not require, quo ad interstate commerce, qualification. Compare *Yellow Manufacturing Acceptance Corporation v. American Oil Co.,* 191 Miss. 757, 2 So. 2nd 834; *Stone v. General Contract Purchase Corp.,* 193 Miss. 301, 7 So. 2nd 806, 140 A.L.R. 1029, affirmed, *C. I. T. Corporation v. Stone,* 317 U.S. 591, 87 L. Ed. 484; *Lincoln National Life Ins. Co. v. State Tax Commission,* 196 Miss. 82, 16 So. 2nd 369; *Reichman-Crosby Co. v. Stone,* 204 Miss. 122, 37 So. 2nd 22; *Stone v. Reichman-Crosby Co.,* — Miss. —, 43 So. 2nd 184, certiorari denied, 339 U.S. 917, 94 L. Ed. 1342.

In this connection, we desire to reiterate again that correctly said, with deference, in the dissenting opinion in *Memphis Natural Gas Co. v. Stone,* 335 U.S. 80, 92 L. Ed. 1832, 1846:

> "• • • On judicial review of this administrative denial, the parties stipulated that 'all of the facts stated in said petition are true and no proof of the same shall be required in this cause'. The decision therefore must be based on the undisputed allegations of the petition."

So, when Finance shipped these notes to Discount in Baton Rouge and conducted thereasto the collection of that therefrom arising in manner and form as was done, all constituted interstate commerce even though tainted with illegality, quo ad state law. Compare *Leisy v. Hardin*, 135 U.S. 100, 34 L. Ed. 128; *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465, 31 L. Ed. 700.

Naught, with deference, contra is found in *Nathan v. Louisiana*, 8 How. 73, 12 L. Ed. 992, because

(a) The tax there levied was not a privilege license conditioning the right to create interstate relationships. Compare *Crutcher* v. *Kentucky*, 141 U.S. 47, 35 L. Ed. 649; *Pullman Co. v. Adams*, 189 U.S. 420, 47 L. Ed. 877; *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 93 L. Ed. 1613.

(b) The tax was in lieu of other taxes presumptively the equivalent of a property tax. Compare *Postal Tel. Cable Co.* v. *Adams*, 155 U.S. 688, 39 L. Ed. 311.

(c) It pre-dated *Paul v. State of Virginia*, 75 U.S. 168, 8 Wall. 168, 19 L. Ed. 357, and fell with the decision of *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 88 L. Ed. 1440.

(d) It was enforceable only in due course and was not a condition precedent. Compare *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 65 L. Ed. 165, approved in *Memphis Natural Gas Co. v. State Tax Commission*, 323 U.S. 682, 89 L. Ed. 553; *Parke, Davis & Co. v. Cook*, 323 U.S. 681, 89 L. Ed. 552; *International Harvester Co. v. Evatt*, 329 U.S. 416, 91 L. Ed. 390, 394.

(e) Compare *Raley & Bros.* v. *Richardson*, 264 U.S. 157, 68 L. Ed. 615.

Note that the State seeks to impose this tax ex post facto solely in virtue of the money moving between Finance and Discount interstate. No transactions whatsoever are shown and the focus is sharply drawn upon a single issue: May, to promote interstate commerce, there be this method of doing business, requisite, we submit, and essential to appropriately meet the needs of those living under the protection

of the Federal Constitution? Compare *Stockard v. Morgan*, 185 U.S. 27, 46 L. Ed. 785, wherein the syllabus is:

> "A privilege tax imposed by a state statute upon residents of that state as merchandise brokers whose business is exclusively confined to soliciting orders from jobbers and wholesale dealers within the State, as agents for nonresident parties, firms, or corporations, for goods to be shipped by such nonresident principals to such jobbers or dealers, is an unconstitutional invasion of the commerce clause of the Constitution of the United States."

Compare "Annotation", 155 *A.L.R.* 239; 33 *Am. Jur.*, "Licenses", Sections 27-29, p. 349; 8 *Am. Jur.*, "Brokers", Sec. 8, p. 994, 1951 Supp., p. 44; 12 *C.J.S.*, "Brokers", Sec. 8, p. 12; 58 *C.J.S.*, "Money Lenders", Sec. 4, p. 857.

We, therefore, hereunder submit that done by Finance as a broker was commerce, quo ad Mississippi, and so being Section 9696-135, being construed by Mississippi's court to make this tax a condition precedent to the right to do the same, was unconstitutional. Being unconstitutional, it was void and a void tax unquestionably deprives of property without due process when enforced.

If that done be interstate commerce, then this tax thereon is unquestionably void. Compare *Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17, 78 L. Ed. 622; *Chassanoil v. City of Greenwood*, 291 U.S. 584, 78 L. Ed. 1004; *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U.S. 384, 79 L. Ed. 934; *International Textbook Co. v. Pigg*, 247 U.S. 91, 54 L. Ed. 678.

How and when a Federal question is, is for this Court, and so being no state court may under any label take away this prerogative. Compare *Angel v. Bullington*, 330 U.S. 183, 91 L. Ed. 832. See, also, *Radio Station WOW, Inc., v. Johnson*, 326 U.S. 120, 89 L. Ed. 2092, followed in *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 92 L. Ed. 1212. And this question of due process predated the suggestion of error, having been raised as soon as the Circuit Court disregarded the facts and assumed to make a tax imposition by extending that done by Finance to

include the lending of money in virtue of the pretended fact that the short delay by Discount in accepting the notes, in fact accepted and collected, made Finance thereasto a money lender. As a state question, with deference, this is shocking. Compare *State v. Rombach*, 112 Miss. 737, 73 So. 731; and *Tower Underwriters Inc. v. Lott*, 210 Miss. 389, 49 So. 2nd 704, holding that agency may hereasto be.

After commerce has begun, even ad valorem taxing power cannot be exerted so as to therewith interfere. Compare *Diamond Match Co. v. Village of Ontonagon*, 188 U.S. 82, 47 L. Ed. 394; "Annotation", 11 *A.L.R. 2nd* 938; *Empresa Siderurgica, S.A. v. Merced County*, 337 U.S. 154, 93 L. Ed. 1276.

Further, this statute is highly penal and must be very strictly construed. Compare *Tower Underwriters Inc. v. Lott*, 210 Miss. 389, 49 So. 2nd 704.

Further, imposing as it assumes to do double taxation (1) brokerage and (2) lending money, all interpretations should be thereasagainst. Compare *Thompson* v. *Craig*, 196 Miss. 465, 17 So. 2nd 439; *Craig v. Dun & Bradstreet*, 202 Miss. 207, 30 So. 2nd 798.

The proof hereasto must be clear and convincing. Compare *Salitan v. Horn*, — Miss. —, 55 So. 2nd 444 (Adv. Sh); *Dice* v. *Akron, Canton & Youngstown R. Co.*, No. 374, October Term, 1951, 20 LW 4120.

Involving, as this case does, the very existence of our client and the question herein presented being somewhat beclouded, we have aggregated all the cases that would be requisite to a proper presentation hereof to this Court and having thus done make them available in these Appendices for such utilization, however, only as this Court may deem appropriate. We do not in any way seek to transgress the limitations imposed by Rule 12, but having hereasto these cases submit them for the Court's utilization vel non as it may deem proper.

APPENDIX 6

Alt v. Bailey

May 7, 1951, 211 Miss. 547, 52 So. 2nd 283:

"This suit was filed by the State Tax Collector for the use and benefit of the City of Jackson against L. E. Alt and P. E. Puckett, partners, doing business under the trade name of Acme Loan Service, to recover privilege taxes and damages alleged to be due and owing to the City of Jackson by the Acme Loan Service *for the privilege of engaging in the business of lending money at a greater rate of interest than 15 per cent per annum.* The defendants are nonresidents of the State of Mississippi, and the suit was filed as a nonresident attachment suit in the chancery court. D. L. Minor, Mrs. D. L. Minor and the Commercial Bank and Trust Company were named in the bill of complaint as garnishee-defendants.

"Alt and Puckett, in their answer, admitted that they were trading in the City of Jackson as Acme Loan Service, but denied that they were engaged in the business of lending money, or that they were charging and contracting for the payment of a greater rate of interest than 15 percent. They averred in their answer that they were engaged in the business of brokering loans for individuals, *and as brokers were paid compensation for their services; that the lender with whom they placed loans for their customers was the Avoyelles Trust and Savings Bank of Bunkie, Louisiana; and that all notes executed by their customers in for loans made by them were made payable to said bank in the State of Louisiana.* The defendants, Alt and Puckett, further alleged in their answer that the notes executed by their customers in favor of said bank included interest calculated at the rate of six percent per annum for the term of the loan, and the defendants denied that they were liable for the privilege tax claimed to be due and owing to the City of Jackson. The garnishee-defendants filed separate answers in which they stated that they had no funds in their hands belonging to the defendant partners; but the garnishee-defendants, D. L. Minor and Mrs. D. L. Minor, in their answer,

stated that they had in their possession and under their control the office supplies and equipment used in and about the business of the Acme Loan Service.

On the trial of the case before the chancellor, P. E. Puckett, one of the partners in the Acme Loan Service, having been called as an adverse witness, testified that the Acme Loan Service had been engaged in the loan brokerage business in the City of Jackson since June 1949; that the method of operating the business was as follows: When a customer came into the place of business to borrow money, he was required to sign four papers, namely, an application for the loan, an agreement designated as a "brokerage contract", a note payable to the Avoyelles Trust and Savings Bank, in Bunkie, Louisiana, and a draft drawn on that bank for the amount the customer was to get on the loan less the small charge designated as interest; that the customer then endorsed the draft; and that the defendants cashed the draft for him, the customer thereby receiving the actual cash. Puckett testified that, after the application was received, the application and the personal references given by the borrower would be checked through the local credit bureau, and that as a rule it took about a day to get a report on the application. After it had been determined that the customer was entitled to credit, the customer was then required to sign the brokerage contract for the loan. He also testified that the brokerage charges on a note for $50.00 to be paid in four monthly installments would probably amount to $17.00. Puckett testified that the payments on the loan were usually made through the Acme Loan Service office, and that the amounts received from the borrower as payments on the loan were remitted to the bank in Louisiana by the Acme Loan Service.

In the making of the loan the customer was required to sign a draft drawn on the bank in Louisiana and payable to himself. The customer then endorsed the draft, and the Acme Loan Service cashed the draft. A customer might however, if he desired to do so, cash the draft elsewhere; but the draft was usually cashed by the Acme Loan Service.

When the borrower made payments upon the loan, such payments were made to the Acme Loan Service, and part

of the payment was remitted to the bank in Louisiana and part of it was applied to the brokerage agreement executed by the borrower to cover the charges made by the Acme Loan Service for its Services in procuring the loan.

Puckett testified that the Acme Loan Service endorsed and unconditionally guaranteed the payment of the paper sent to the bank in Louisiana, and that usually the Acme Loan Service was required to take up the paper 30 days after its maturity if the note had not been paid within that period of time.

Puckett testified that from October 15, 1949 to November 21, 1949, which included 32 business days, the Acme Loan Service made loans aggregating the sum of $11,200.00, and for that amount of money brokerage fees were charged which amounted to $4,934.00. The brokerage fees amounted to approximately 45 percent of the amount of loans. Puckett testified further that D. L. Minor was the manager of the business of the Acme Loan Service in Jackson, that the business was carried on in a comfortable office, and that five employees were regularly engaged in carrying on the business of the Acme Loan Service in Jackson.

The complainant offered two witnesses who had obtained loans from the Acme Loan Service and who testified as to the manner in which the loans were procured.

H. D. Shearer, an employee of the City of Jackson, testified that he applied for and obtained a loan of $50.00 from the Acme Loan Service, and that he paid back $78.40 in four monthly installments. The interest and loan charges amounted to $28.40. The witness testified that it required about five minutes to get the loan; that he did not know that he was borrowing money from a bank in Louisiana; that he obtained a loan of $50.00 and signed papers to pay back $78.40 in four monthly payments. On cross-examination the witness testified that "I signed three or four different sheets of paper and they counted me out the money." The witness stated that he did not know what kind of papers he signed, and could not say what they were unless he could see his own signature on the papers.

James Daniels (colored) testified that he worked at Jones & Bedwell Service Station; that he had obtained several $10.00 loans from the Acme Loan Service; that each of the

loans was repaid in eight weekly installments of $2.10 each, the amount repaid on each of the $10.00 loans being $16.80. When asked how long it took him to get the money, he replied "just a few minutes." The witness stated that he did not know that he was borrowing any money from a bank in Louisiana; that he signed the papers presented to him without reading them; that he got $10.00 each time and paid back $16.80. On cross-examination the witness stated that he signed an application, a brokerage contract, a note and a draft. He stated that he did not know that he signed a note payable to a Louisiana bank, or a draft drawn on a Louisiana bank, but that he got the money.

In answer to the written interrogatories propounded to L. E. Alt and P. E. Puckett prior to the date of the trial, the partners gave an account of the method of procedure followed by them in making loans, which was substantially the same as the method outlined in Puckett's oral testimony hereinabove mentioned. The partners stated in answer to the interrogatories that they had no written contract with the Avoyelles Trust and Savings Bank covering the making of loans for the bank, and that the bank was not obligated in any way to accept any loan it did not care to accept. But under the arrangement made with the bank the partners guaranteed the loans made by the bank, and the brokerage charges paid by the customer included charges to cover the partners' guarantee of the payment of the notes to the lender. No securities of any kind were deposited with the bank to secure the Acme Loan Service's guarantee of the paper.

The partners, according to the answers to the interrogatories, make no loans and collect no interest; they merely negotiate loans for their customers and guarantee the payment of the loans.

J. C. Battaile, an auditor and accountant employed by the State Tax Collector, called as a witness for the complainant testified that a brokerage fee of $17.00 on a loan of $50.00 to be repaid in two months would be equivalent to interest at the rate of 204 percent per annum; that a brokerage of $28.40 on a loan of $50.00 to be repaid in two months would be equivalent to interest at the rate of 340 percent

per annum; and that a brokerage fee of $6.80 on a loan of $10.00 to be repaid over a period of eight weeks would be equivalent to interest at the rate of 880 percent per annum.

After the complainant had rested, P. E. Puckett was recalled as a witness to testify again in behalf of the partners, and asked the question, "What services do you render the borrower for the charge you make?" Puckett stated that the Acme Loan Service, for the service charge exacted of the borrower, negotiated the loan, guaranteed the payment of the loan and transmitted the borrower's payments to the lender. Puckett also testified that the Acme Loan service had negotiated loans in the amount of $69,081.42 up to January 31, 1950; that it had failed to collect $4,050.90, which included $2,616.85 due the bank in Louisiana and $1,434.05 brokerage charges; that its expenses through January 31, 1950 had amounted to $21,488.38. The witness also testified on cross-examination that, although the Louisiana bank had a right to reject any loan, it had never rejected a loan made by the Acme Loan Service.

Puckett also stated that he resided in Birmingham, Alabama, that his business headquarters were in Birmingham, and that the business which he conducted in Birmingham was a loan business, and not a brokerage business; that the partners had two other offices in Mississippi, and that they had five offices in Alabama; that in Alabama they made direct loans themselves to the borrower, and that their business in Alabama was not carried on as a loan brokerage business; that the loans made by them through their Mississippi offices, however, were made for the bank in Louisiana.

L. E. Alt, the other partner, testified that he lived in San Francisco, California, and had been engaged in the banking business for 30 years; that he and Puckett were partners in the loan business in Alabama and in the brokerage business in Mississippi; that he made the original arrangement with the bank in Louisiana to handle the notes taken by the brokerage firm in Mississippi; and that in making the arrangement with the bank in Louisiana he gave the bank financial references on himself and Puckett. Alt testified that he had an office with Puckett in Birmingham, and that he also had an office in California.

On cross-examination Alt was asked this question: "You are a very solvent man and thoroughly responsible, are you not?" The witness answered, "Some people think so."

The Court asked the witness the question: "Does the bank out there (the bank in Bunkie, La.) send its money over here to you, like one of these witnesses on the stand said, without any sort of understanding or security for that money?" The witness answered: "Our endorsement is on the back of each note, Acme Loan Service. That is now owned by Mr. Puckett and myself." Alt then stated that the partners had no securities of any kind pledged to the bank to secure the notes of their customers. The court then asked the following questions and received the following answers: "Q. Then is it your credit rating in the business world that makes you a good customer, or security, for that bank over there in lending its money? A. Yes, I would assume that is so. Q. Well, is it anything else but that, and if it isn't that, what is it, as it makes them turn out the money on your endorsement? A. I would say that was it."

The chancellor found that the business in which the Acme Loan Service was engaged was in no real sense a brokerage business, and that the "brokerage" pretense was a subterfuge. The chancellor found that the partners were engaged in a money-lending business in which a greater rate of interest than 15 percent per annum was charged, and that the partners were liable for the payment of the annual privilege tax sued for for the year beginning June 1, 1949.

We think that the findings of the chancellor are amply supported by the testimony. In fact, the only reasonable conclusion that can be drawn from the testimony in the record is that the appellants were engaged in a money-lending business where a greater rate of interest than 15 percent per annum was charged, and that the claim they were carrying on a brokerage business was a mere subterfuge for the purpose of enabling them to collect interest at a greater rate than 15 percent per annum. The principles of law governing cases of usury are therefore applicable, and the court in determining the question whether the appellant were actually engaged in lending money at usurious rates of interest had a right to look through the forms which

the transactions were made to assume and to base its decision upon the real facts. Parchman v. McKinney, 12 Smedes & M. 631; McLaurin v. Parker, 24 Miss. 509; Hiller v. Ellis, 72 Miss. 701, 18 So. 95, 41 L. R. A. 707; Brown v. West, 80 Miss. 764, 32 So. 52; 66 C. J., section 299, page 305; Kennedy et al. v. Porter et al., 176 Miss. 742, 170 So. 286.

The proof shows convincingly that the appellants were engaged in the small loan business in the city of Jackson. As stated in appellants' advertisement, "In most cases the loan is arranged in a few minutes." So far as the borrower was concerned, all that he had to do was to sign the three or four papers which were presented to him for his signature. The money was then counted out to him in the Acme Loan Service office in Jackson. He had nothing to do with sending the draft to the bank in Louisiana, where the appellants had made their own arrangements to get the money. When he repaid the loan, together with the "brokerage charge" and interest, he repaid the same to the appellants' cashier in the same office in Jackson. The fact that the appellants obtained the funds which they loaned to their customers from the bank in Bunkie, Louisiana, upon notes of their customers bearing their own unqualified endorsement, instead of upon notes signed by the appellants as makers, did not change the nature of the appellants' business in any way.

This case is clearly distinguishable from the case of Tower Underwriters, Inc., v. Lott, — Miss. —, 49 So. 2d 704. In the Tower case the loans were actually made in Bogalusa, Louisiana. When the borrower signed the papers in the office of the Tower Underwriters, Inc., at Greenwood, all he received was a draft on the Louisiana Loan Discount Corporation. The borrower was then required to forward the draft to Bogalusa, Louisiana, for payment, and the draft was paid by the Louisiana Loan Discount Corporation at Bogalusa. In the case we now have before us, the borrower signed the draft and received the money in the offices of the Acme Loan Service in Jackson. The loan, as far as he was concerned, was actually completed in Jackson. In the Tower case the president of the Tower Underwriters, Inc., testified that the Tower

Underwriters, Inc., was not able to make the loans itself, that the loans made by Tower Underwriters, Inc., as brokers, amounted to approximately one and one-half million dollars a year and that the Tower Underwriters, Inc., did not have the money to lend. In the case that we now have before us the partners testified that it was their own credit rating which enabled them to obtain the funds which they loaned from the bank in Bunkie, Louisiana. The partners admitted that they were engaged in the money-lending business generally in the State of Alabama, and that they made loans directly to their customers in the State of Alabama where their principal offices were located.

In 55 Am. Jur. Par. 16, p. 334, in discussing the payment of commissions to intermediaries, the writer says: "And where the actual lender, in order to evade the statute, pretends to act as agent or broker and exacts a commission for his supposed service in procuring the loan from a third person, the court, upon proof of the deceptive character of the transaction, will declare it usurious. The fact that a borrower is required or induced to go through the form of employing an agent who is in reality acting for the lender, or even to execute an instrument in connection with the loan, containing an allegation that the intermediary through whom it is negotiated is his agent, will not alter the case, so as to prevent the payment of a commission to him from constituting usury."

In the case of State v. Abbott Loan Service et al., (Texas Civil Appeals) 195 S. W. 2d 461, the court had under consideration practically the same question that we now have before us, and the facts in that case were very similar to the facts disclosed by the record in this case. In that case the court said: "While it is the settled law in this state that an agent or a broker may lawfully charge a commission for his services in negotiating a loan with a third party and that, where the commission is charged in good faith and is not made as a cloak to avoid the usury law, such commission will not be taken into consideration in determining whether or not the loan is usurious, it must appear that the extra charge was made in good faith for so negotiating the loan and such a charge may not be made where the party charg-

ing the commission is merely lending his own money. Greever v. Persky, 140 Tex. 64, 165 S. W. 2d 709."

We think that the evidence is sufficient to justify the finding of the chancellor that the appellants were engaged in the business of lending money in Mississippi at a greater rate of interest than 15 percent per annum, and that the decree of the lower court should be affirmed.

Affirmed.

APPENDIX 7

Tower Underwriters, Inc. v. T. A. Lott

January 2, 1951, 49 So. 2d 704

This suit is for the recovery of $1,546 representing the total amount of principal, interest and other charges paid by the appellee, T. A. Lott, on four loans of money made to him by the Louisiana Loan Discount Corporation of Bogalusa, Louisiana, allegedly through its agent, the appellants, the Tower Underwriters, Inc., at Greenwood, Mississippi. The suit was begun in the circuit court against both corporations but was transferred to the chancery court where a decree was rendered for the amount sued for against the appellant, Tower Underwriters, Inc. Process was had on appellant and also a summons had been issued for the non-resident defendant which was attempted to be served by delivering a copy thereof to the appellant on the theory that it was making the loans in this State as agent of its said non-resident defendant.

The trial court held that it had no jurisdiction of the non-resident defendant by virtue of the attempted service of process, and the cause proceeded to trial against the appellant, Tower Underwriters, Inc., after being dismissed as to the non-resident defendant because of lack of jurisdiction for want of process.

Section 36, Code of 1942, provides, among other things that: "If a rate of interest is contracted for or received, directly or indirectly, greater than twenty per centum per annum, the principal and all interest shall be forfeited, and

any amount paid on such contract may be recovered by suit."

The facts are that on July 3, 1945, the borrower, T. A. Lott, went to the office of the Tower Underwriters, Inc., at Greenwood, Mississippi, and applied for a loan of $300 on an automobile. He was thereupon given a draft drawn by said corporation on the non-resident corporation for the sum of $300, and a second draft similarly drawn in his favor for $53.78, which he then and there endorsed and delivered to the appellant resident corporation, (1) after having executed then and there an installment note of $387 payable to the order of the non-resident corporation or bearer in twelve installments, one due on the first day of each month, bearing eight percent interest from maturity until paid, but which note appeared on its face to have been executed at Bogalusa, Louisiana, and (2) after having executed a "Receipt for Loan" dated at Greenwood, Mississippi, and reading as follows: "300 No. C54 Greenwood Miss. 7/3 1945 RECEIVED of my agent and broker, TOWER UNDERWRITERS, INC., trading as Tower Loan Brokers, the sum of $387.00 less discount and reserve of $33.22 paid on my behalf to the lender and less fee of $53.78 paid my agent above named for insurance and services rendered.

"T. A. LOTT."

and (3) after having executed an indemnifying chattel deed of trust on the automobile in favor of the appellant resident corporation, which recited that "Whereas, Tower Underwriters, Inc. acting for and as the agent for the undersigned, has, by virtue of its unconditional endorsement and guarantee of note hereinafter described, secured from others a loan for the undersigned in the sum of $387 as evidenced by note of said amount, executed by the undersigned in favor of the lender * * *", the same was given to save it harmless, etc.

The installment note above referred to contains a recital that the note "is given and is being negotiated and closed, and payable in Bogalusa, Louisiana; * * * it is agreed that rights of the note holders shall be admeasured by the laws of the State of Louisiana, which are hereby expressly adopted to control this entire transaction."

The draft given to the borrower for $300 was cashed by him at a local bank within less than thirty minutes from the time he applied for the loan, and he then went on his way. In other words, the papers were not submitted to the non-resident corporation for approval between the time of their execution and the borrower's receipt of the money. He thereafter paid the monthly installments, or otherwise paid off the loan, to the resident defendant at Greenwood. The borrower testified that he read the papers before signing the same and understood that he was agreeing to pay the sum of $387 in return for the $300 that he had received. He further testified, however, that he did not request the resident defendant to find someone to make him a loan or employ it to serve as his agent for that purpose, but that he merely walked into the office, applied for the loan and received the said draft which he was able to cash as soon as he could go to the local bank.

The two drafts hereinbefore mentioned were honored by the Louisiana Loan Discount Corporation when presented in due course at its bank in Bogalusa, the drawee receiving in return therefor the installment note of the borrower for $387, duly endorsed by the appellant, Tower Underwriters, Inc.

It is to be inferred from the testimony of the borrower that the indemnifying deed of trust which he executed on the automobile in favor of the appellant, Tower Underwriters, Inc., was also sent to Bogalusa, Louisiana, together with a fire, theft and collision insurance policy on his automobile, since he testified that after he paid his note in full he inquired about the deed of trust and the insurance policy and was informed by the appellant that the same were at Bogalusa, Louisiana.

On July 3, 1946, and November 19, 1946, respectively, two additional loans were obtained at the office of the said resident corporation in the sum of $300 each, and for which the notes were executed in the sum of $392 each, all in the same form and manner and security as the first loan, the borrower receiving in each instance one draft for $300, and another for $68.48, the latter of which he endorsed over to the resident corporation, and he executed a similar "Re-

ceipt for Loan" as that hereinbefore quoted, in each instance; and on April 7, 1947, a fourth loan was obtained for $273 for which he executed a similar note for $375, and the receipt for which loan in the form hereinbefore quoted showed that the resident corporation received $79.50 for insurance and services. An indemnifying deed of trust and insurance policy were executed in each of these three instances as in the case of the first loan.

The borrower testified that he repaid the last mentioned loan in two months after he borrowed the money, and that he repaid the first three loans within about six months after he borrowed the money.

The net result was that of the non-resident corporation allegedly received as interest $33.22 on the first loan, $23.52 on each of the second and third loans, and $22.50 on the last loan, and that the appellant, resident defendant, allegedly received as brokerage fees $53.78 on the first loan, $68.48 on each of the second and third loans, and $79.50 on the fourth loan, and paid therefrom insurance on the automobile in the total sum of $115.44 during the life of the four loans, leaving a net balance of brokerage fee of $154.80. Had each of the loans run for a full year instead of being paid off in monthly installments, or within less than six months from the date of the notes respectively, the Louisiana Loan Discount Corporation would have been entitled to collect only $93.84 at the rate of eight per cent per annum, whereas it collected the sum of $102.76 as interest. This amount plus the alleged brokerage fees colleced by the resident corporation amounted to more than twenty per centum per annum interest on the loans, if all of the same was in fact interest, after deducting the insurance premiums paid by the resident corporation of $115.44.

Therefore, the question presented is whether or not the $102.76 received by the non-resident corporation and the total of $270.24 received by the resident corporation as "agent and broker", less the $115.44 paid therefrom for insurance, may all be regarded as interest for the hire of the money loaned to the borrower. If the alleged brokerage fees were lawful charges, then the borrower would not have been entitled to a decree for the recovery of all of the princi-

pal and other amounts paid even as against the Louisiana Loan Discount Corporation if the court had acquired jurisdiction by service of process on said non-resident corporation. The provision of Section 36, Code of 1942, hereinbefore quoted, is highly penal and must therefore be strictly construed. Hence, no recovery for the full amount repaid on the loans, together with the interest and other charges, can be had against the resident defendant, Tower Underwriters, Inc., unless we could hold on the record before us that said defendant was in reality the lender of the money, or received the payments as payee, assignee or transferee of the loans. To so hold, it would be necessary that we disregard the acknowledgment in writing of the borrower, knowingly made, that he received the money from the resident corporation as his agent and broker, he having admitted on the witness stand that he read the papers that he signed wherein he acknowledged that he was paying the amount received by the resident defendant for insurance and services rendered to him as his agent and broker. If he read the note that he signed and the draft that he cashed, then he saw that he was getting the money on a draft that was to be paid by the non-resident corporation, and he saw that he was agreeing in his promissory note to repay the same to the non-resident corporation. And if he read the receipts that he signed for the loans, he saw that the non-resident corporation, as lender, was to receive only a portion of the amount that he was agreeing to pay over and above the net proceeds of the loan, and that the remainder was to be received by his "agent and broker" for "insurance and services rendered", included among which services was its endorsement of the note which he indemnified by his deed of trust.

This brings us to the applicable law to be applied under the foregoing state of facts. The willingness of necessitous borrowers to pay whatever may be demanded in order to obtain temporary relief from financial embarrassment, and the ingenuity of lenders in taking advantage of this need has resulted in a great many devices to evade the usury laws. The trial court undertook to frustrate what it deemed to be an attempted evasion of such laws in the instant case by

looking beyond the form of the transactions to their substance. Because of the exorbitant charges in connection with the four loans involved in this case, we are sympathetic with the view thus entertained by the chancellor; but the question at issue is whether or not the resident corporation, against whom the decree of $1,546 was rendered, may lawfully charge and collect a brokerage or service fee from the borrower for placing a loan for him with a non-resident corporation and for guaranteeing the payment of such loan. It seems that this Court has repeatedly upheld the affirmative of this proposition, if we are to assume that the amounts received by the resident defendant for its own use and benefit were brokerage or service fees and not interest.

The president of the appellant, Tower Underwriters, Inc., testified that the same is a Mississippi corporation, having approximately 125 stockholders over the State and maintains about seventeen loan brokers offices in Mississippi where it renders assistance as a loan agent and broker of the borrowers of small loans, acts as their agent in transmitting payments to the nonresident lender, and guarantees in full the payments of the borrowers' accounts to the lender by endorsement and placing with the lender sufficient reserve to guarantee that its promise will be taken care of.

The witness further testified, and it is undisputed, that no stockholders of the Louisiana Loan Discount Corporation own any stock in the appellant Tower Underwriters, Inc., and that neither do any of the stockholders in the latter own any of the stock in the former; that they have no officers or directors in common but are entirely separate and distinct corporate entities; that the resident corporation is not authorized by its charter to make loans but acts only as an agent or broker in that behalf; and that while the bulk of its business is done with this nonresident corporation, it receives no part of the principal or interest when the loan is paid, but merely remits the same to the nonresident lender and receives no compensation, either directly or indirectly, from the lender.

The witness was asked: "Is the Tower Underwriters, Inc. able to make these loans itself?" A. "It is not. It would take approximately one and a half million dollars a year

and we don't have it." Thus, it will be seen that the non-resident corporation has been able to work out a scheme whereby it may place loans to this enormous amount in this State and collect these exorbitant charges on the money advanced as fees by it to the agent and broker of the borrower, and to successfully claim that it is not doing business in this State or violating our usury laws, since it has no office, place of business or agents and employees in this State, has not qualified to do business under our laws, and admittedly receives no part of the fees collected by the agent and broker of the borrower. But, the problem thus presented is one for the Legislature, and is not for the courts in the absence of clear, positive and certain proof that more interest is received as such than is allowed by Section 36, Code of 1942. We held in the case of Yerger, et al. v. Ainsworth, et al., 202 Miss. 747, 32 So. 2d. 548, that such a degree of proof is required.

In the case of New England Mortgage Security Company, et al. v. Townes, (Miss) 1 So. 242, in an opinion written by Mr. Justice Cooper, it was held that one Adams and his associate agents and brokers could lawfully charge the borrower $400 as a brokerage fee out of the proceeds of a $2,000 loan without the loan being tainted with usury. The Court recognized that "The evidence discloses a most exorbitant charge made by those through whom the loan was secured for the appellee; but these parties seem to have been regularly engaged in an independent business of their own, in which the appellant (the lender) had no sort of interest, and with which they had no connection." The court also stated that: "It is true that courts of equity will look through the form to the substance of a transaction, and declare that to be usury which is usury, no matter what device is resorted to to cover the real nature of the dealings between the parties; but it cannot, on mere suspicion, establish the relation of principal and agent, nor visit upon the innocent the consequences of the illegal act of another, for whom he was not at all responsible." However, that case may be distinguished from the case at bar by the fact that the lender did not know of the exorbitant charges, whereas in

the instant case the nonresident corporation knew of the exorbitant charge when it honored the alleged broker's draft therefor.

Nevertheless, this Court later held in the case of Pass v. New England Mortgage Security Company, 66 Miss. 365, 6 So. 239, that knowledge on the part of the lender of the exorbitant charges of the intermediary was immaterial if the lender received no part thereof, as is true in the case at bar, and did not receive a greater rate of interest for the use of its money than the law allows, the Court, speaking through Mr. Justice Campbell, saying: "It matters not, if intermediaries, through whom the borrower effected the loan, charged for their services a sum which added to the interest stipulated made the cost of the use of the money to exceed the legal rate of interest. If the borrower has to pay others than the lender for the means of obtaining the loan, that is not usury, for it is not the price of the use of the money, but the cost of getting it at all. If I agree to pay a man a thousand dollars to secure for me from another a loan of five thousand dollars at a legal rate of interest, and he obtains it by his credit or influence or labor, it matters not by what means, I cannot maintain the defense of usury against the evidence of debt executed by me to the person who was induced to part with six thousand dollars as a loan to me, if that person neither stipulates for nor receives for his loan more than the legal rate of interest. Nor does it make any difference that he has full knowledge that the cost to me of securing the loan is so great as that supposed. I may be willing to lend money on the guaranty of an individual. If one desiring to borrow pays that individual even an exorbitant price for his guaranty, and thereby gets my money at a rate of interest to be received by me within the bounds of the statute, there is no usury. I may be willing to lend money on the faith of the representation of another that he thinks the transaction a safe one, and if he charges a borrower for the service rendered him in recommending to me the loan, that is their matter and in no manner affects my loan, if I am not to get more than the law allows for the use of money. The application of these

principles to the facts of this case presents the loan as without any semblance of usury."

In the case of Allen v. Grenada Bank, et al., 160 Miss. 419, 133 So. 648, the Court held that even though the bonus was received by the lender's agent instead of the agent and broker of the borrower, it does not constitute usury where the one receiving the bonus rendered valuable services to the substantial advantage of the borrower "outside of and beyond the making of the loan, and outside of any obligation justly encumbent on the lender in the preparation or consummation thereof." In the instant case, we are unable to say that a guarantee by the broker of the repayment of the loan was not outside of and beyond the course usually followed in the making of a loan. In the case, supra, the Court said that: " * * * there is no usury if the lender receives, and is to receive, no part of the compensation paid by the borrower to said agent for and in consideration of his services, and the said compensation is not so far fictitious or excessive or unfair as to support the conclusion that it was a mere circuitous device to evade the usury laws; and this is particularly true where, as in this case, the agent, in order to procure the loan, becomes indorser and furnishes security for a substantial protion of it. This statement of the rule is confirmed by the text, and the numerous cases cited, in 27 R.C.L., pp. 231-238; by the cases cited in the notes, 46 Am. St. Rep., pages 194-199, and by Floyd v. Candler, 148 Miss. 200, 205, 114 So. 344. See, also, Pass v. Mortgage Security Co., 66 Miss. 365, 6 So. 239."

The trial court was of the opinion in the case at bar that the compensation charged by the resident corporation was so fictitious, excessive and unfair as to support his conclusion that the whole scheme was a mere circuitous device to evade the usury laws. But in the instant case the borrower acknowledged in writing, as aforesaid, that the appellant resident corporation was acting as his agent and broker, and admits having read the note which disclosed that he was becoming the debtor of the nonresident corporation, the payee named in the note, and that the lender was not to receive the brokerage fee, as interest or

otherwise, but that he was paying the same to the broker by the draft drawn on the nonresident corporation which he endorsed and delivered to the resident corporation.

The reference made in the opinion in the quotation above, as taken from the Grenada Bank case, to 27 R.C.L. 236, states in Section 38 of the text that: "It is not unusual for a borrower to employ and agent or broker to negotiate a loan for him, and the amount paid for such services, added to the interest on the loan, may exceed the legal rate of interest, but the payment of such compensation will not make the loan usurious, so long as the lender was not employing the broker as his own agent or receiving from him any of the money paid by the borrower, even though the broker performed some services which might properly have been performed by the lender or his agent. * * *"

The more recent case of Abraham et ux v. Friendly Finance Company of Biloxi, Inc., et al., 38 So. 2d. 323, (Miss) involved a situation where the appellee, a Mississippi corporation, obtained for the appellants a loan from the Industrial Finance & Thrift Corporation of Louisiana, and there the Court said that: "From the record, we conclude that the Mississippi corporation is a separate and independent entity and its brokerage charges for handling the transaction are not improper, and are not items to be computed in adjudging the liability of the Louisiana corporation." The court had acquired jurisdiction over the Louisiana corporation by the suit to set aside, as usurious, a certain note and deed of trust executed by the Abrahams to the Louisiana corporation, or bearer, and to recover the payments made. The only distinction between that case and the case at bar is that it was necessary for the borrowers to wait for the proceeds of the loan until the note and deed of trust could be transmitted to the Louisiana corporation for acceptance and approval. Whereas, in the instant case the borrower received the money on a draft before his note was ever sent to the lender.

We do not think that the cases of *Shannon* v. *Building & Loan Association*, 78 Miss. 955, 30 So. 51; *Building & Loan Association* v. *Shannon*, 80 Miss. 642, 31 So. 900 and *Castleman* v. *Canal Bank & Trust Company*, 171 Miss. 29, 156

So. 648, are decisive of the point here involved. We think that the applicable rule is correctly stated in 55 Am. Jur. 334, Section 16:

"While a lender may not be charged with usury on account of any commission or bonus paid by the borrower to his own agent or to an independent broker for services in negotiating or procuring a loan, a requirement that the borrower pay a commission to an intermediary through whom the loan was actually or apparently negotiated will be held to constitute usury if the court can see that the payment was really exacted as a consideration for the loan, in excess of legal interest, and not as compensation for the services of the intermediary to the borrower. And where the actual lender, in order to evade the statute, pretends to act as an agent or broker and exacts a commission for his supposed service in procuring the loan from a third person, the court, upon proof of the deceptive character of the transaction, will declare it usurious. • • •"

However, we do not think that the proof in the case at bar, when considered as a whole, is sufficient to warrant the application of the highly penal statute here involved as against the appellant, Tower Underwriters, Inc., in such manner as to require it to refund to the borrower the principal and interest paid to the nonresident payee in the note, even though paid through the office of the appellant resident corporation. Therefore, the decree of the trial court must be reversed and a decree rendered here in behalf of the appellant dismissing the bill of complaint.

Reversed and decree here for the appellant.

APPENDIX 8

Privilege Tax Statutes

Sec. 9696-115, Mississippi Code of 1942:

"Loan brokers.—Upon each person engaging in this state in the business of brokering or negotiating loans through industrial loan companies or other similarly designated loan institutions, on personal or other securities, as agent

for another, and receiving a brokerage, commission, or other compensation for such service as follows:

"In municipalities of class 1 ..... $50.00
"In municipalities of classes 2 and 3 ..... $35.00
"In municipalities of classes 4, 5, 6, 7, and elsewhere in the county ..... $25.00"

Sec. 9696-134, Mississippi Code of 1942:

"Money lenders.—Each person engaged in this state in the business of making loans of money on personal or other securities, of selling and negotiating written evidences of debt for the payment of money either fixed or uncertain, and receiving payment therefor in installments or otherwise, and commonly known as 'industrial loan companies,' 'industrial banks,' 'Morgan Plan Company,' and 'Morris Plan Company,' or similar designations other than national or state banks and building and loan associations, shall be deemed to be operating an industrial loan business within the provisions of this section.

"Upon each person operating an industrial loan business as defined herein, the following tax:

"In municipalities of class 1 ..... $400.00
"In municipalities of class 2 ..... $300.00
"In municipalities of classes 3, 4 and 5 ..... $200.00
"In municipalities of classes 6, 7 and elsewhere in the county ..... $ 75.00"

Sec. 9696-135, Mississippi Code of 1942:

"Money lenders who charge more than fifteen per cent.—Upon each person doing a money lending business where a greater rate of interest than fifteen per cent (15%) per annum is charged, whether the loan is secured or unsecured, or whether by taking bills, of sale, absolute or conditional ..... $2,000.00"

FILED
APR 5 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 688

HAYS FINANCE COMPANY, INC., ET AL.,
Appellants,

vs.

MRS. THOMAS L. BAILEY, STATE TAX COLLECTOR

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM WITH INTEREST AND DAMAGES

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 688

HAYS FINANCE COMPANY, INC., ET AL.,

Appellants,

vs.

MRS. THOMAS L. BAILEY, State Tax Collector

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM WITH INTEREST AND DAMAGES

Comes now Appellee and files her statement in opposition to Appellant's statement as to jurisdiction, and hereby moves the Court to dismiss the appeal herein, or affirm the decision and judgment of the Supreme Court of the State of Mississippi, from which decision and judgment said appeal is taken, with interest and damages, as provided by Rule 30, Paragraphs 1 and 2, or to regard the appeal papers as a petition for writ of certiorari and deny the same, with damages and costs as provided by 28 U. S. C. A., Sec. 2103.

Statement

For convenience, we shall refer to principal Appellant as Finance and to Southern Discount Corporation as Discount as did counsel for Appellant in his jurisdictional statement.

Section 9696-135 Mississippi Code 1942 (all references to Code sections herein are to Mississippi Code 1942 as amended, unless otherwise noted) is a part of the "Local Privilege Tax Law of 1944", Sections 9696-01, *et seq.* Certain state-wide privilege taxes are levied by Sections 9427, *et seq.*, but there is no state-wide privilege tax on any localized business, like that engaged in by Finance. The adoption of the local privilege tax code by any municipality in the State is purely optional. A municipality need not adopt it at all or it may adopt it but prescribe any percentage of the amount set forth in the Code to be levied and collected within the municipality. The privilege taxes collected within the municipality are solely for the benefit of the municipality itself. Section 9696-235.

It appears from the agreed statement of facts, R. 7, that Jackson did adopt the permissive privilege tax code, but nowhere in the record in this case does the ordinance whereby Jackson adopted the code appear. Neither the Supreme Court of Mississippi nor this Court will take judicial notice of a municipal ordinance. This Court has no way of knowing what safeguards and administrative remedies, if any, were made available by the ordinance to a protesting tax payer. Beyond the requirements of Section 9696-235 that the ordinance must tax all privileges set forth in the Code at no more than 100% of the amount fixed by the Code the municipality under its general legislative powers could write anything it wished into the ordinance.

Section 9696-135, in and of itself, is certainly not invalid. The Supreme Court of Mississippi did not have, and this

Court will not have, the privilege of determining the validity of the ordinance putting the local privilege tax code into effect because such ordinance was and is before neither Court.

There is a presumption in favor of the validity of a municipal ordinance, law or regulation which appears to have been enacted under competent municipal authority. *Real Silk Hosiery Mills* v. *Portland*, 294 Fed. 587, Aff. 297 Fed. 897, Rev. on other grounds, 268 U. S. 325, 69 L. Ed. 982; *City of St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 37 L. Ed. 380; reh. den. 149 U. S. 465; 37 L. Ed. 810.

This presumption casts the burden on the one asserting the invalidity or nullity of the ordinance to establish that fact. *Puget Sound Electric R. Co.* v. *Benson*, 253 Fed. 710, 165 CCA 304.

In Its Essence, This Case Presented Nothing More Nor Less Than a Simple Question of Fact

This heading is definitely not an oversimplification of this case. In her declaration Appellee simply charged that Finance had been engaged within the municipality in the business of lending money at a greater rate of interest than 15% without paying the requisite license tax therefor. R. 1. Finance in its answer simply denied this allegation, asserting that it was a broker subject to Section 9696-115, and not a lender subject to Section 9696-135. Appellant attempts to capitalize on the rule that fraud must be proved by clear and convincing evidence. We admit the rule but submit that it has absolutely no application in this case. Nowhere in the pleadings or proof is fraud even remotely mentioned. The fact issue would have been precisely the same had the declaration charged that Finance had been honestly mistaken in believing that it was a broker instead of a lender. The one simple issue of fact upon which the whole case turned was: Was Finance a broker or a lender?

Appellant makes much of the fact that Jackson had precedently accepted $50.00 from Finance and issued to it a license to trade as a broker under Section 9696-115. It would be preposterous to assume that a municipality should or could investigate every applicant for a privilege license in order to determine that such applicant was actually engaged in the business which he represented himself to be engaged in. The applicant for the license must file a sworn statement containing "all the information necessary for the officer collecting the tax to properly classify the applicant and ascertain the amount of tax due." Sec. 9667. One might apply for a license to sell pins and then proceed to sell bulldozers. The fact that the municipality had licensed him to sell pins, on his sworn application that he would thus do, would not estop it from demanding of the licensee the larger tax upon learning that the licensee was actually selling bulldozers.

If this appeal is dismissed, or the case affirmed, as we respectfully submit it should be, Jackson, on Finance's application, could refund the amount erroneously paid by Finance in the belief, or upon the contention, that it was a broker. This Court has no concern with Finance's rights in that respect.

Appellant seeks to obviate the inevitable conclusion that the only thing involved in this case was a simple issue of fact as to whether Finance was a broker or a lender by emphasizing that there was no conflicting testimony, the case having been tried on an agreed statement of facts, the deposition of one witness, and certain documentary evidence. One of the cardinal principles of Mississippi jurisprudence is that the trier of fact, whether Court or jury, is not confined to a consideration of facts as such, but is entitled to draw every reasonable inference therefrom. *Jefferson* v. *Yazoo and M. R. R. Co.*, 194 Miss. 729, 11 So. 2d 442.

Again, Appellant is in error in asserting that usury laws of either Mississippi or Louisiana are here involved. The validity of the notes taken by Finance and sent to Discount is in no way involved. Neither Discount nor any borrower is a party to this suit and no decision herein would be *res adjudicata quo ad* them. Should Discount sue a defaulting borrower on one of the notes such borrower could plead usury or not as he saw fit and Discount would be in no way bound by the final decision in this cause to which it was not a party. In its essence, this is simply a suit to collect a privilege tax alleged to be due and owing by Finance upon the theory that Finance is engaged in a business subject to the tax. Furthermore, this Court will take no cognizance of the possible collateral effect of the final decision herein.

As a trier of fact, the Circuit Judge undoubtedly held that from the facts, circumstances, and documentary evidence before him, looking through the form of the transactions to their substance, the reasonable inference could be drawn that Finance was in fact the lender, and Discount a mere supplier of operating capital to the lender, or the purchaser, at a discount, of the notes acquired by the lender.

The fact that the note was made payable to Discount was form—not substance. It was unconditionally guaranteed by Finance. The fact that the printed form of note was dated at Baton Rouge was form—not substance. It was actually executed and delivered to Finance in Jackson. The fact that Discount was the drawee in the draft was form—not substance. The draft was immediately cashed by Finance in Jackson. Making a simple calculation on the basis of the figures set forth, R. 10: A borrower who received $10.00 net and repaid $12.80 in four equal weekly installments, if the whole $2.80 be considered interest, paid interest at the rate of 559% per annum.[1]

[1] Calculated by competent actuary. We are assuming Court will take judicial notice of science of arithmetic.

Ignoring the so-called "brokerage" charge of $2.76, a borrower who received $10.00 net and repaid $10.04 in four equal weekly installments, if the four cents be considered interest, paid interest at the rate of 13% per annum[1].

Ignoring the four cents alleged to be interest, if a borrower received $10.00 net and repaid $12.76 in four equal weekly installments, the borrower paid interest at the rate of 546% per annum.[2]

The facts and circumstances shown in this case are certainly susceptible to a reasonable inference that the $2.76 denominated a brokerage charge was actually interest received by Finance on its own money borrowed by it from Discount. Actually, Discount was simply lending money to Finance to replenish the money which Finance had loaned to Jackson borrowers. Labels do not mean anything. Suppose the borrower's note had been made payable to Finance, and Finance had discounted the note to Discount, or had placed the note with Discount as collateral, in order to procure money wherewith to make subsequent loans. Certainly, Finance's local activity would be that of a lender and not a broker. The trial court undoubtedly decided that by the circuitous device of having the note made payable to Discount, and guaranteeing it unconditionally, Finance could not convert what was in fact a loan into a brokerage transaction. Discount did not have to accept any of the notes. When Finance was called upon to make good its guaranty the note was returned to it and it received interest thereon at the rate of 6% thereafter, having previously received interest at the greater rate for the period of the currency of the note.

In *Pass* v. *New England Mortgage Security Co.*, 66 Miss. 365, 6 So. 238; *Allen* v. *Grenada Bank*, 160 Miss. 419, 133 So. 648; *Abraham* v. *Friendly Finance Co.*, 205 Miss. 71,

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[2] Calculated by competent actuary. We are assuming Court will take judicial notice of science of arithmetic.

38 So. 2d 323, and *Tower Underwriters, Inc.* v. *Lott*, 210 Miss. 389, 49 So. 2d 704, all relied on by Appellant, the facts are quite different in vital particulars from those in the case at bar. Furthermore, even were the facts in those previous cases identical with those in the case at bar the Supreme Court of Mississippi had the right to overrule the previous decisions, either expressly or by necessary implication in simply declining to follow them, as was done in *Mississippi Baptist Hospital* v. *Holmes*, — Miss. —, 55 So. 2d 142, suggestion of error overruled 56 So. 2d 709.

The case at bar was originally decided by the Supreme Court of Mississippi on November 12, 1951. On December 3, 1951, while the suggestion of error in the case at bar was still pending, the Court decided *Dixie Brokerage and Guaranty Co.* v. *Bailey*, — Miss. —, 55 So. 2d 438. The facts in the *Dixie Brokerage and Guaranty Co.* case, with only trivial exceptions, were identical with those in the case at bar. Discount herein was also involved in that case, though not as a party to the suit. The manner in which Dixie Brokerage and Guaranty Co. and Discount operated was identical with the manner in which Finance and Discount operated in the case at bar, as will be seen from the Court's opinion. The Court held that the Circuit Judge was justified in interpreting the agreed statement of facts and documentary proof to mean that Dixie Brokerage and Guaranty Co. was actually the lender, regardless of the mere form of the transaction.

Section 1521 provides:

> "Trial by jury may be waived by the parties to an issue of fact in actions on contract, and with the assent of the court, in other actions."

Both parties agreed "that these causes be tried without a jury before the Judge of this Court, and submitted to the Court for determination and decision of both the law and

the *facts* * * * ". R. 34. (Emphasis supplied.) That is a patent concession by Finance that the facts testified to on both direct and cross-examination by the witness Harry L. Bivens, taken in connection with the documentary exhibits, were susceptible to different interpretations, one that Finance was a broker and the other that it was a lender. That was the factual issue pin-pointed by the pleadings. Had the facts been both undisputed *and* susceptible to only one interpretation, that for which Appellant now contends, why did Finance agree to submit its case to the Court "for determination and decision of both the *law* and *facts* * * *"? (Emphasis supplied) The case would have posed merely a question of law.

Is it not remarkable that Finance would contend that it was a mere broker and that Discount was the real lender when Discount did not even have any charter power, unless it was under general provisions, to make any personal unsecured loan? Article Three, R. 31, of Discount's charter gives it power to lend money on mortgages and to buy mortgage notes and to *purchase* notes generally. It is given no express power to lend money to individuals on open unsecured notes, or even on notes guaranteed by others. What it was actually doing, and the trial court evidently so found, was *purchasing* unsecured notes from Finance. The mere circumstance that Discount was the payee in such notes would not change the substance of the transaction. The fact remains that Discount had the right to reject any note and required the unconditional guaranty of Finance on each note that it accepted. Thus it is patent that Discount was relying on the credit and solvency of Finance, and not on that of the individual borrower, whom Discount never investigated or even knew. In fact, Discount did not even know the names of the individual borrowers until several days after their transactions with Finance were completed when Discount opened the envelope drafts.

The Federal Questions Here Were Not Raised at All or Were Not Timely Raised

Appellant complains of a violation of the Due Process Clause of the Fourteenth Amendment, of a violation of the Commerce Clause, Article I, Par. 3, Sec. VIII, and of a violation of the Full Faith and Credit Clause, Article IV, Sec. 1.

The Full Faith and Credit Clause is in no way involved in this case. Discount was not a party to this suit. Its rights could be in no way affected by this suit. No transaction between Finance and Discount was even remotely involved. The only question was as to whether Finance's local business at Jackson, Mississippi, its transactions with local borrowers, placed it in the category of a broker or a lender. Louisiana law could not possibly have any extra-territorial effect in this case and was and is in no way involved.

But even had there been a violation of the Full Faith and Credit Clause, this Court would have no jurisdiction under 28 U. S. C. A., Sec. 1257 (2). Neither the trial court nor the Supreme Court of Mississippi was ever given the opportunity to pass on the question, and did not pass on it. From the beginning of the case to its end in the Supreme Court the Full Faith and Credit Clause was never invoked, or even remotely referred to.

In its answer, R. 5, Finance raised no Federal question and asserted no Federal constitutional right whatsoever. On the contrary, it admitted the validity of the statute, merely denying that it was liable under the statute as a lender. In its answer Finance says:

> "This defendant admits that privilege taxes and damages for money-lending, wherein a rate in excess of 15% per annum is charged by the lender, are fixed and established by the laws of the State of Mississippi,

and constitute a debt to the municipality, and, if occurring in the City of Jackson, constitute a debt to the City of Jackson; but this defendant at all times denies that it is a money lender, and denies that it is liable for the privilege tax to the City of Jackson, Mississippi, as sued for in this declaration." R. 6.

Further, in the agreed statement of facts Finance admitted:

> "That before either of said suits were filed and before the defendant started business, the City of Jackson, Mississippi *had duly and legally adopted and enacted ordinances* whereby it imposed a privilege tax upon all persons engaged in the business of lending money in said city, for which money a greater rate of interest than 15% per annum is charged and contracted for, of $2,000.00 per year, payable in advance before beginning business, and annually in advance thereafter, and if not paid when due, a penalty of 50% of the amount of said privilege tax is added thereto as damages and required by law to be collected." R. 7. (Emphasis supplied)

Is it not remarkable that Finance here attacks as invalid the very ordinance which it admitted in its answer had been "duly and legally adopted and enacted"? It cannot be argued here that the statute and ordinance were valid, in and of themselves, but invalid as applied to Appellant in this case, for that is to argue simply the validity of the *tax* and not that of the *statute,* and under 28 U. S. C. A., Sec. 1257 (2), this Court has jurisdiction only in those cases where is drawn in question the validity of a statute of any sate on the ground of its being repugnant to the Constitution and the decision is in favor of its validity. The Supreme Court of Mississippi never passed on the validity of either the statute or the ordinance. It simply held that the trial court had properly interpreted the facts in resolv-

ing the fact issue as to whether Finance was a broker or a lender.

In its motion for a new trial following rendition of judgment Finance for the first time invoked the Due Process Clause. Although it is not shown in the record herein, we feel that Appellant's quotation, on page 15 of the jurisdictional statement, of the caption of Point III of Appellant's brief in the Supreme Court of Mississippi justifies us in making the statement that not one single case was cited by Appellant in its brief under Point III in support of that contention. On the contrary, Appellant said at page 32 of its brief in the Supreme Court of Mississippi:

> "Due process of law ordinarily involves (1) notice; (2) opportunity to be heard; (3) opportunity to defend, and (4) orderly proceedings adapted to the nature of the case. All of these requirements were met in the case at bar *except* the orderly proceedings adapted to the nature of a case involving fraud under the Mississippi jurisprudence."

Since fraud was not an issue in this case and Appellant admitted to the Supreme Court of Mississippi that the due process requirement of notice, opportunity to be heard, and opportunity to defend were all met, Appellants effectually conceded to the Supreme Court of Mississippi that its property had not been taken without due process of law.

Furthermore, both in its motion for new trial, R. 36, and in its assignment of errors in the Supreme Court of Mississippi, R. 39, Appellant complained that the "judgment" of the trial court is the taking of property without due process of law. That does not meet the jurisdictional requirement laid down in 28 U. S. C. A., Sec. 1257 (2).

If we interpret its jurisdictional statement correctly, Appellant's main contention here is a violation of the Commerce Clause. Neither the trial court nor the Supreme

Court of Mississippi was ever given an opportunity to pass on that quesion. After the case had been briefed, argued and decided by the Supreme Court of Mississippi and the judgment entered in that court, Appellant in its suggestion of error, the equivalent of a petition for rehearing in other jurisdictions, asserted for the first time that the "judgments" were in violation of the Commerce Clause. R. 44. The validity of the statute was not even questioned at that late date. Furthermore, the Supreme Court of Mississippi followed the rule it had always followed that "new points, made and presented for the first time on a suggestion of error, will not be considered unless an exceptional reason is shown, and we find that no such reason exists here. *Owen* v. *State*, 1945, 197 Miss. 561, 570, 19 So. 2d 822; *Miss. Oil and Gas Board* v. *Superior Oil Co.*, 1947, 202 Miss. 139, 32 So. 2d 200; *Delta Cotton Oil Co.* v. *Elliott*, 1937, 179 Miss. 200, 217, 172 So. 737, 174 So. 550." R. 46, 47.

Under the circumstances reflected by this record it is settled beyond question that this Court has no jurisdiction to entertain this appeal because no Federal question contemplated by 28 U. S. C. A., Sec. 1257 (2) was ever raised or passed on by the Supreme Court of Mississippi.

Scott v. *Jones*, 46 U. S. 343, 12 L. Ed. 181;
Smith v. *Hunter*, 48 U. S. 738, 12 L. Ed. 894;
Maxwell v. *Newbold*, 59 U. S. 511, 15 L. Ed. 506;
In Re Kemmler, 136 U. S. 436, 34 L. Ed. 519;
Ferry v. *King County*, 141 U. S. 668, 35 L. Ed. 895;
Missouri v. *Harris*, 144 U. S. 210, 36 L. Ed. 407;
Snell v. *Chicago*, 152 U. S. 191, 38 L. Ed. 408;
Miller v. *Texas*, 153 U. S. 535, 38 L. Ed. 812;
Morrison v. *Watson*, 154 U. S. 111, 38 L. Ed. 927;
Bergemann v. *Backer*, 157 U. S. 655, 39 L. Ed. 845;
Central Land Co. v. *Laidley*, 159 U. S. 103, 40 L. Ed. 91;

Louisville R. R. Co. v. *Louisville*, 166 U. S. 709, 41 L. Ed. 1173;
Citizens Sav. Bank v. *Owensboro*, 173 U. S. 636, 43 L. Ed. 840;
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Louisville R. Co. v. *Woodford*, 234 U. S. 46, 58 L. Ed. 1202;
Fox v. *Washington*, 236 U. S. 273, 59 L. Ed. 573;
St. Louis R. Co. v. *Shepherd*, 240 U. S. 240, 60 L. Ed. 662;
Missouri Pacific R. Co. v. *Taber*, 244 U. S. 200, 61 L. Ed. 1082;
Green v. *Frazier*, 253 U. S. 233, 64 L. Ed. 878;
House v. *Road Imp. Dist.*, 266 U. S. 175, 60 L. Ed. 229;
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People, etc., Rosevale Realty Co. v. *Kleinert*, 268 U. S. 646, 69 L. Ed. 1135;
Penn. R. Co. v. *Ill. Brick Co.*, 297 U. S. 447, 80 L. Ed. 796, reh. den. 297 U. S. 728, 80 L. Ed. 1011;
Charleston Fed. Sav. & Loan Assn. v. *Alderson*, 324 U. S. 182, 89 L. Ed. 857, reh. den. 324 U. S. 888, 89 L. Ed. 1436;
Radio Station WOW v. *Johnson*, 326 U. S. 120, 89 L. Ed. 2092, Motion denied 66 S. Ct. 11.

No Substantial Federal Question Is Here Involved

It is well settled that a state may tax interstate commerce. What it may *not* do is to *discriminate* against interstate commerce. "Equality is the theme."

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 84 L. Ed. 565;

Nelson v. *Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888;

Stone v. *Interstate Natural Gas Co.*, 308 U. S. 522, 84 L. Ed. 442;

Southern Natural Gas Corporation v. *Alabama*, 301 U. S. 148, 81 L. Ed. 970;

Memphis Steam Laundry Cleaner, Inc. v. *Stone*, No. 253, October Term, 1951, 20 LW 4162.

The tax was not levied on Discount but on Finance. The geographical location of Discount is of no moment. Under the Court's finding of fact Finance would have been liable for the tax even had Discount shared the same office with Finance in Jackson.

In *Memphis Steam Laundry Cleaner, Inc.* v. *Stone, supra*, relied on by Appellant here, the privilege tax imposed on the non-resident appellant there was over six times that imposed on resident competitors and, therefore, discriminated against interstate commerce. The statute under attack here levies the same tax on every person lending money at a greater rate than 15%, whether he is engaged in interstate or purely intrastate commerce.

Finance was domiciled in, and carried on its business in, Jackson, and enjoyed all of the municipal benefits and protection afforded every citizen, corporate or individual. "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435, 85 L. Ed. 267.

The record shows that Finance was earning thousands of dollars per month from the operation of its business in

Jackson. Even so, the fact that the payment of the tax may make the business unprofitable does not render the tax void. That is for the State Legislature.

Fox v. *Standard Oil Co.*, 294 U. S. 87, 79 L. Ed. 780.

The buying and selling of notes and commercial paper by citizens of one state from and to citizens or corporations in another state is not interstate commerce.

Hemphill v. *Orloff*, 277 U. S. 537, 72 L. Ed. 979;
Blumenstock v. *Curtis Pub. Co.*, 252 U. S. 435, 64 L. Ed. 649.

Exchange and money brokers are not engaged in commerce and may be required to pay a state license tax.

Nathan v. *Louisiana*, 8 How. 73, 12 L. Ed. 993;
Hall v. *Geiger-Jones Co.*, 242 U. S. 539, 61 L. Ed. 480;
Ficklen v. *Taxing Dist.*, 145 U. S. 1, 36 L. Ed. 601;
Hopkins v. *United States*, 171 U. S. 578, 43 L. Ed. 290;
Anderson v. *United States*, 171 U. S. 604, 43 L. Ed. 300;
Minnesota v. *Blasius*, 290 U. S. 1, 78 L. Ed. 131.

If only a part of the business is carried on within the taxing authority a privilege tax may be imposed and collected.

Horning v. *District of Columbia*, 254 U. S. 135, 65 L. Ed. 185.

A state may require the payment of an occupation tax from one engaged in both intrastate and interstate commerce where the tax is not increased because of the interstate business carried on.

Cooney v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 79 L. Ed. 934.

If the business is inseparable the tax is valid.

Pacific Telephone & Telegraph Co. v. *Tax Commission of Washington*, 297 U. S. 403, 80 L. Ed. 760.

If it be considered that the tax is not solely for the purpose of raising revenue but also to discourage the operation of those usually designated as "loan sharks", concerns capitalizing on human necessity and misery (a person who is willing to pay at the rate of 559% per annum for the use of $10.00 for four weeks must indeed be in necessitous circumstances), it is still valid. In the exercise of its general police power and its power to license occupations and businesses a state or municipality may impose a license tax for doing business of a local or domestic nature, although the property involved may have come originally from another state, or although a contract relating to the business may have been made in another state, and although the business when carried on wholly within the state may involve property delivered outside the state.

Cargill v. *Minnesota*, 180 U. S. 452, 45 L. Ed. 619;
Caldwell v. *North Carolina*, 187 U. S. 622, 42 L. Ed. 336;
Rearick v. *Pennsylvania*, 203 U. S. 507, 51 L. Ed. 295;
Dozier v. *Alabama*, 218 U. S. 124, 54 L. Ed. 965.

The Supreme Court of Mississippi has declared that the lending of money at an excessive rate of interest is an evil and is in violation of public policy of the State. *Jones, et al.* v. *Lamensdorf, et al.*, 175 Miss. 565, 167 So. 624. Where occupations or privileges are in their nature injurious or offensive to the public welfare, taxes which are practically prohibitive are lawful. *St. Louis Poster Adv. Co.* v. *St. Louis*, 249 U. S. 269, 63 L. Ed. 599. But an intention to prohibit a particular business cannot be imputed because of the amount of the tax. *Williams* v. *Fears*, 179 U. S. 270, 45 L. Ed. 186. It is not within the power of parties to make a contract to convert a local business into an interstate business so as to get the protection of the commerce clause.

Browning v. *Waycross*, 233 U. S. 16, 58 L. Ed. 828;
Superior Oil Co. v. *Knox*, 280 U. S. 390, 74 L. Ed. 504.

In determining whether a state statute is in violation of the commerce clause this Court will adopt the construction of the statute put on it by the state court of last resort, in the absence of exceptional conditions.

Interstate Oil Pipe Line Co. v. *Stone*, 337 U. S. 662, 93 L. Ed. 1613; reh. den. 333 U. S. 839, 94 L. Ed. 513.

A nondiscriminating privilege tax imposed on a business carried on within the taxing district is valid, although it may incidentally affect or relate to interstate commerce.

U. S. Fidelity & Guaranty Co. v. *Kentucky*, 231 U. S. 394, 58 L. Ed. 283;

McGoldrick v. *Berwind-White Coal Mining Co.*, *supra*.

It is not a valid objection to an ordinance that it partakes of both the character of a regulation and also that of a privilege tax, although revenue may be obtained from its enactment. So long as the state law authorizes both regulation and taxation it is enough and the enforcement of such an ordinance violates no provision of the United States Constitution.

Gundling v. *Chicago*, 177 U. S. 183, 44 L. Ed. 725.

There is here no question of due process that this Court may review.

Fallbrook Irrigation Dist. v. *Bradley*, 164 U. S. 112, 41 L. Ed. 369;

Tracy v. *Ginzberg*, 205 U. S. 170, 51 L. Ed. 755;

Iowa Cent. R. Co. v. *Iowa*, 160 U. S. 389, 40 L. Ed. 467;

Simon v. *Craft*, 182 U. S. 427, 45 L. Ed. 1165;

Bayside Fish Flour Co. v. *Gentry*, 297 U. S. 422, 80 L. Ed. 772;

Standard Oil Co. v. *Marysville*, 279 U. S. 582, 73 L. Ed. 856.

Every requirement of due process of law is satisfied if opportunity is given to present all available defenses to a

competent tribunal before imposition of the tax and before the command of the state to pay becomes final.

Nickey v. *State of Mississippi*, 292 U. S. 393, 78 L. Ed. 1323.

Appeal Here Improvidently Taken, Appeal Papers Should Be Regarded and Acted upon as a Petition for Writ of Certiorari, and Certiorari Should Be Denied.

Both in its motion for new trial, R. 36, and in its assignment of errors in the Supreme Court of Mississippi, R. 39, as well as in the suggestion of errors, R. 44, Appellant merely contended that the "judgment" rendered by the trial court operated as the taking of Appellant's property without due process of law.

Nowhere in this entire proceeding is there drawn in question the validity of either the statute or the ordinance (the latter was not even before the Court) on the ground of repugnance to the Constitution, and neither the decision of the trial court nor that of the Supreme Court of Mississippi dealt in any way with the validity of either the statute or ordinance. Therefore, direct appeal, a matter of right in proper cases, is not the proper method of seeking review here.

The claim here actually is that Appellant's rights, privileges, or immunities were violated by the *judgment*. It is perfectly manifest, therefore, that if Appellant has any remedy to seek review at all it is under 28 U. S. C. A., Sec. 1257 (3) by petition for writ of certiorari.

If we are correct in this position the Court will treat the appeal papers as a petition for writ of certiorari and dispose of them accordingly. 28 U. S. C. A., Sec. 2103.

While appeal, in a proper case, is a matter of right, a review of certiorari is not, "but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Rule 38, 5.

There is assuredly no important issue of general law and no principle, settlement of which is important to the public, involved in this case. In *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393, 67 L. Ed. 712, Mr. Chief Justice Taft said:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals. The present case certainly comes under neither head."

We also respectfully call the Court's attention to the cases cited in Footnote 3 to the dissenting opinion of Mr. Justice Frankfurter, in *United States* v. *Shannon*, 96 L. Ed. 2221 (Adv. Sh.).

The ordinance adopted by the City of Jackson putting into effect Section 9696-135 can have no extraterritorial effect beyond the corporate boundary of the city. It is entirely optional with every other municipality in the State as to whether or not it adopts a similar ordinance. The case presents a question simply of local law, if it presents *any* question of law. As a matter of fact, it presents *no* question of law. The issue framed by the pleadings and submitted to the trial court for determination was a simple question of fact: Under the agreed statement of facts, the testimony of the one witness Harry L. Bivens, and the documentary evidence, was Appellant's business that of a lender subject to Section 9696-135, or was it that of a broker subject to Section 9696-115? The immediate parties, with the possible exception of a few others, carrying on business

similar to that engaged in by Appellant, are the only ones having any interest in the solution of this fact question. Certainly, the public at large has no overwhelming interest in perpetuating Appellant's claimed "right" to continue to enjoy a huge net return (546% per annum), on the capital actually borrowed by it from Discount, by the payment of the paltry sum of $50.00 per year to the City of Jackson for the privilege of so doing. This Court has a much more important and exalted function under our Federal system than to review a case of such limited and local importance, and, with great deference for opposing counsel and respect for this Court, we submit that it should exercise its sound judicial discretion in denying certiorari herein.

Conclusion and Prayer

It is perfectly obvious that the appeal herein is frivolous and without merit, there being no substantial Federal question timely raised or even involved, that it was sued out merely for delay, and that, if treated as a petition for writ of certiorari, no reasonable ground for granting the writ is shown.

Wherefore, Appellee prays in the alternative as follows, to wit:

(a) That Appellee's motion to affirm the judgment of the Supreme Court of Mississippi be granted and that Appellee be awarded interest and 10% damages as provided by Rule 30, or just damages for her delay and single or double costs, as provided by 28 U. S. C. A., Sec. 1912; or,

(b) That Appellee's motion to dismiss the appeal be granted and that she be awarded interest and damages as provided by Rule 30; or,

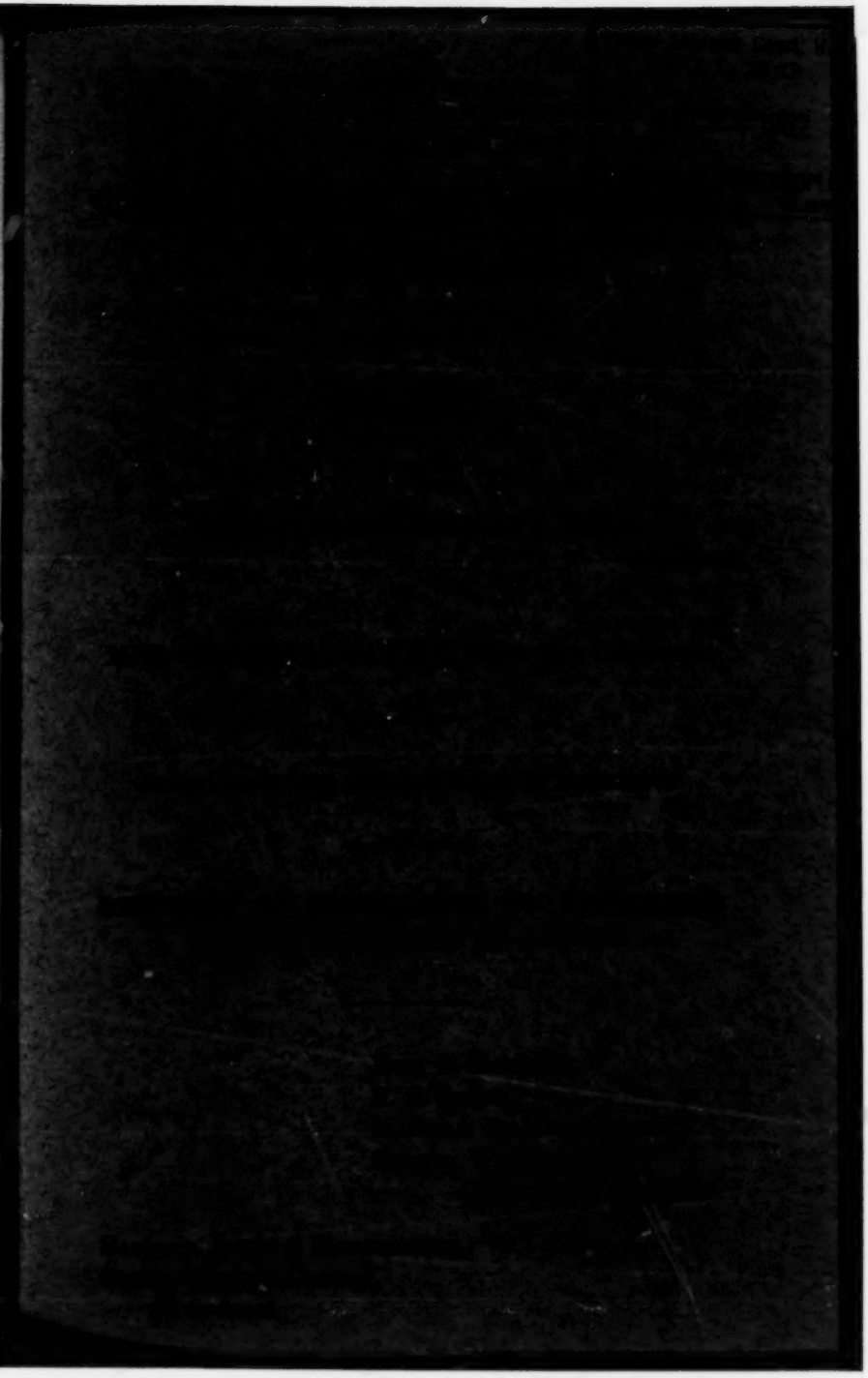
(c) That the papers whereon the appeal herein was taken be regarded as petition for writ of certiorari, that such petition be denied, and that reasonable damages for delay

and single or double costs be awarded as provided by 28 U. S. C. A., Sec. 2103.

Respectfully submitted,

HUBERT SLATON LIPSCOMB,
Counsel for Appellee.

LIPSCOMB & RAY,
JOHN G. BURKETT,
E. W. STENNETT,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 688

HAYS FINANCE COMPANY, INC.,

Appellant,

vs.

MRS. THOMAS L. BAILEY, State Tax Collector

RESPONSE OF APPELLANTS TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Herein, pursuant to Rule 12, Appellant filed the requisite Jurisdictional Statement, and by reason of Appellant's finances made available as Appendices thereto the Supplemental decisions of this Court, as Appendices 4 and 5, as to the effect of the Commerce Clause and the Full Faith and Credit Clause which invalidated the statute sued upon when sought to be made the predicate of a valid judgment. Now, Appellee has herein, pursuant to Rule 12, moved to dismiss or affirm, and in response thereto we, with deference, ask that the Court now read and consider on this motion to dismiss or affirm these two appendices which precedently were submitted only for the Court's convenience, and to be utilized, if utilized at all, at its pleasure; but with the mo-

tion to dismiss or affirm that therein said becomes relevant, and, with deference, controlling. The Opinion of Mississippi's Court on the motion, Appendix 3 to the Jurisdictional Statement, now appears in 56 So. 2d 806, (advance sheets).

I. Herein Appellant follows the usage of referring to the Hays Finance Company, Inc. as "Finance" and to the Southern Discount Corporation as "Discount".

(1) As to the alleged failure to make the ordinance of the City of Jackson, authorized by Section 9696-235, *Mississippi Code of 1942*, a part of the record, the answers thereto are obvious, and are:

a. Section 9696-235 provides:

> "The board of supervisors or the governing body of the municipality may, by general ordinance, or by resolution, *adopt this privilege tax code*, and the approval of such ordinance or resolution *shall constitute the privilege tax code of the county or municipality*, such general ordinance or resolution *must tax* all privileges set forth in this act, *but may prescribe* any percentage of the entire code herein set forth from one hundred per cent (100%) or less, to be levied and collected in such counties or municipality." (Emphasis ours.)
>
> Amended by House Bill 50, Mississippi Laws of 1952, so as to become mandatory.

And, pursuant thereto, the city as at August 1, 1946, adopted "The Code", imposing a 100% of that authorized as shown by a certified copy hereto annexed as Appendix "A", and under the law of the State of Mississippi the Circuit Court and the Supreme Court might have taken, and did take, we submit, judicial notice to the extent that the City of Jackson had, pursuant to Section 9696-135, made an imposition in consonance with the authorization granted by Section 9696-235. Compare *City of Amory* v. *Yielding*, 203 Miss. 265, 34

So. 2d 726. Herein the city, as plaintiff, sought and obtained from Defendant the recovery of 6,000 of Finance's dollars. To so thus do, Appellee had to demonstrate to the Court the existence of the requisite authority therefor, and to that end the Court in Mississippi took judicial knowledge of Code Section 9696-135, epitomized as Appendix 8 in the Jurisdictional Statement,—whereto for that contained reference is made,—so that it was encumbent upon the City to show this authorization, if it would have this judgment, and to contend that it has not so thus by the record been shown would be to deny to the City any right of recovery whatsoever; that is to say, a plaintiff must prove its case, and if herein the plaintiff so did, quo ad Section 9696-135, by the stipulation in the record, so did the defendant, the stipulation thereasto in the agreed statement of facts being: (R. 14)

> "2. That before either of said suits were filed and before the defendant started business, the City of Jackson, Mississippi had duly and legally adopted and enacted ordinances whereby it imposed a privilege tax upon all persons engaged in the business of lending money in said city for which money a greater rate of interest than 15% per annum is charged and contracted for, of $2,000.00 per year, payable in advance before beginning business, and annually in advance thereafter, and if not paid when due, a penalty of 50% of the amount of said privilege tax is added thereto as damages and required by law to be collected."

This is the sole stipulation whereasto issue was, and, if the City be correct, it has recovered a judgment wherefor no authorization was.

b. But, under Code Section 9696-135, the imposition was of the $2,000, and under Section 9696-235 there had to be an adoption of "the Code" with power only as to percentage as to the amount of the tax, and when it was set at $2,000 we, with deference, submit all that was requisite

has been made to appear as well for the plaintiff as for the defendant, and that which the Supreme Court sought to do was, quo ad Section 9696-135, to make a tax recovery of Finance, in virtue of an adjudication in the *Alt* case, localizing it in Mississippi. Compare that opinion (*Alt* v. *Bailey*, 211 Miss. 547, 52 So. 2d 283, Appendix 6 to Jurisdictional Statement), wherein it was said:

> "• • • They averred in their answer that they were engaged in the business of brokering loans for individuals, and as brokers were paid compensation for their services; that the lender with whom they placed loans for their customers was the Avoyelles Trust and Savings Bank of Bunkie, Louisiana; and that all notes executed by their customers for loans made by them were made payable to said bank in the State of Louisiana. The defendants, Alt and Puckett, further alleged in their answer that the notes executed by their customers in favor of the said bank included interest calculated at the rate of six percent per annum for the term of the loan, and the defendants denied that they were liable for the privilege tax claimed to be due and owing to the City of Jackson. • • •",

and in virtue of the alleged facts establishing usury therein that the Supreme Court could:

> "We think that the findings of the chancellor are amply supported by the testimony. In fact, the only reasonable conclusion that can be drawn from the testimony in the record is that the appellants were engaged in a money-lending business where a greater rate of interest than 15 percent per annum was charged, and that the claim they were carrying on a brokerage business was a mere subterfuge for the purpose of enabling them to collect interest at a greater rate than 15 percent per annum. The principles of law govering cases of usury are therefore applicable, and the court in determining the question whether the appel-

> lants were actually engaged in lending money at usurious rates of interest had a right to look through the forms which the transactions were made to assume and to base its decision upon the *real facts.* • • •" (Italics ours.)

In this case, in Appendix 1 to the Jurisdictional Statement, the Supreme Court of Mississippi, in the Opinion rendered November 12, 1951, specifically declared:

> "• • • We have been unable to detect any material difference between the facts of this case and the facts in Alt et al. *v.* Bailey, — Miss. —, 52 So. 2d 283, which would produce here a result different from that reached in the *Alt* case. We thing that the case is decisive here and calls for an affirmance of this case."

And, on Suggestion of Error, the Supreme Court of Mississippi specifically claimed the right to adjudge the business done in Mississippi to be "intrastate commerce" and in virtue thereof to tax, if it so were intrastate commerce, we admit its power. But note: (Appendix 2 to Jurisdictional Statement).

> "• • • Aside from the fact that the effect of the original opinion herein, and the earlier case of Alt v. Bailey, 52 So. 2d 283 (Miss. 1951), was to find that appellant, the Mississippi taxpayer, was loaning its own money *in a purely intrastate, local activity,* the interstate commerce issue was not assigned as error on this appeal, or argued when the case was submitted. • • •" (Emphasis ours.)

So, it is thus conceded by Mississippi's Court that in the *Alt* case it localized in virtue of testimony which does not appear in this case a segment of the interstate commerce in Mississippi and specifically in this decision as to the suggestion of error adverted to the adjudication that this was "intrastate commerce".

Concededly, all of these notes moved from Jackson to Baton Rouge and were intended so thus to do, and thereof no party has complained. But the Supreme Court of Mississippi, in virtue of a right to suppress usury *inter partes* within the State, has assumed to prohibit under a privilege tax that which is confessedly interstate commerce in a lawful commodity. The right to protect the parties as against usury does not generate in the State the right to prohibit interstate movement whereas to the Constitution is supreme and inviolable, and this was the fundamental error with Mississippi's Court. It may protect against usury, but in so doing it may not prohibit interstate commerce, and its assumption of the right thus to prohibit contravenes the Constitution *per se*. Appellee concedes that all of the evidences of these transactions import interstate movement, but contends that they are but "forms" wherethrough the State Court may look, and seizing substance, tax; but when the form is thus interstate commerce, irrespective of what the motivating intention of those therein engaged was, the State may not tax in virtue of its police power. Compare *Fauntleroy* v. *Lum*, 210 U. S. 230, 52 L. Ed. 1039, and as shown in the Jurisdictional Statement, even if that being done contravened Mississippi's law, she could not prohibit. Compare *Bowman* v. *Chicago & N. W. R. Co.*, 125 U. S. 465, 31 L. Ed. 700; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128. So, the commerce clause does not permit state taxation when the form of that done is interstate commerce, even though in the doing thereof that utilized contravenes the provisions of the police power of the State. This right claimed here by the Supreme Court of Mississippi to authorize taxation of interstate commerce in virtue of a conceded right to protect against usury, with deference, has arisen from a confusion of thought in that court.

c. So, herein Section 9696-135 with the other sections epitomized in Appendix 8, form the basis whereon this tax

imposition was, and by Section 9696-235 the city merely made operative that which the Legislative specifically authorized, and the authorization thus in virtue of Section 9696-135 to the subordinate agency, the city, is not that which has to be determined, but the authorization to the municipality for the tax imposition.

d. Irrespective of the amount that the city collected under Section 9696-135, the principles of constitutional law thereasto applicable are precisely the same, and the sole function that the municipal ordinance had was to designate the percentage, and as above shown 100% has ben designated, and the city is therefore not in a position whereasto it may complain.

(2) Appellee's counsel say (Br. p. 2):

> "* * * This Court has no way of knowing what safeguards and administrative remedies, if any, were made available by the ordinance to a protesting taxpayer. * * *

But this Court does know, as does the Supreme Court of Mississippi, all of the provisions of the privilege tax code making this fund available to the City of Jackson, and, so knowing, the exact terms of the ordinance are immaterial, just as is the case in *City of Amory* v. *Yielding*, 203 Miss. 265, 34 So. 2d 726.

(3) An issue whereon this case is brought is that Section 9696-135, *quo ad* the business done, is unconstitutional when thus extended by the Supreme Court of Mississippi to include that done by and between Finance and Discount. It would be purile to contend, and Appellant does not contend, that Section 9696-135 is not perfectly valid and constitutional, when applied to a person domiciled in Mississippi lending his own money at a rate in excess of 15% whereover said state has complete sovereignty, but, as is, Section 9696-135, under the interpretation given it by the

Supreme Court of Mississippi is extended to include, without a scintilla of evidence in support thereof, that exclusively a brokerage operation and incidental to an interstate transaction. Any bank making in Mississippi a loan of $10.00 might thereas against make a charge of $2.00 lawfully. Compare *Mississippi Code of 1942*, Section 5212.

(4) Appellee's counsel say (Br. p. 2):

> *"Section 9696-135, in and of itself, is certainly not invalid."* (Italics ours.)

This, with deference, is respectfully denied, because Section 9696-135, as conclusively determined by Mississippi's Supreme Court, so far as this hearing is concerned, was full warrant for the tax imposition, and being such full warrant, Appellant says that the sovereignty of Mississippi is not adequate so thus to make it.

II. Appellee contends (Br. p. 3):

> "IN ITS ESSENCE, THIS CASE PRESENTED NOTHING MORE NOR LESS THAN A SIMPLE QUESTION OF FACT."

(1) This, with deference, is denied. The facts are stipulated and are not in dispute. Compare *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, 92 L. Ed. 1832; 2 *Am. Jur.*, "Agreed Case", Sec. 230, p. 363, et seq.; 5 CJS "Appeal & Error," Sec. 1564, p. 400. Under these facts that at issue is the validity of Section 9696-135 as thus interpreted. We confess that if the business of Appellant were intrastate, Section 9696-135 would be valid to that extent *"in a purely intrastate, local activity"*, but with the facts as stipulated, the law of the Constitution is supreme.

(2) Presumptively, Appellant complied with Section 9667, and the documents in the record in writing show a brokerage operation and naught else. Not one of Appellant's customers has been examined in the Court to show

that the Appellant, Finance, was not a broker for such person, and that such person in good faith agreed to pay the proper charges exacted by Finance for (a) obtaining a loan for such customer, and (b) personally guaranteeing the payment therefor. This was perfectly legitimate in Mississippi. Compare *Tower Underwriters Inc.* v. *Lott*, 210 Miss. 389, 49 So. 2d 704, and *Abraham* v. *Friendly Finance Co. of Biloxi*, 205 Miss. 71, 38 So. 2d 232.

Now, when these parties for whom Appellant dealt were thus therewith satisfied and elected to let the transaction stand, the taxing power of the State was invoked by the Tax Collector to convert into a lender-borrower relationship that which as between the parties had been a customer-broker relationship, and the State being a third party to the transaction could not on behalf of the customer elect to avoid the customer-broker relationship and convert it contrary to the will of the customer into a borrower-lender relationship. The right to avoid a transaction is personal to the parties thereto, and by them alone may be exercised. Compare 24 *Am. Jur.*, "Fraud & Deceit," Sec. 216, pp. 45, 46; 24 *Am. Jur.*, "Fraud & Deceit", Sec. 210, pp. 36, 37; 12 *Am. Jur.*, "Contracts", Sec. 289, p. 842; 17 *C.J.S.*, "Contracts", Sec. 519 (h) aa, p. 1136; and 17 *C.J.S.*, "Contracts", Sec. 529, p. 1152. When parties competent to contract have contracted, the State's taxing power does not authorize the destruction of the obligation of this contract so that the State may unlawfully receive that whereto thereunder it is not entitled.

So, when the State of Mississippi, under its power of taxation, sought to impose a liability upon these contracts made by Finance with Discount for the benefit of the borrowers from Discount, it was essential that Mississippi abrogate the terms and provisions of these contracts in their entirety and set up as a predicate for its taxation a

lender-borrower relationship between Finance and these customers, whereto Discount was a stranger. The right thus to do in the *Alt* case was vouchsafed solely in virtue of the right to strike down as fictitious *on the ground of usury* that thus written with the obligations thus inherent, and to treat that as done as being illegal and as a cloak for usury, instead of as being legal and the expression of enforceable contracts between customers and Discount, and Mississippi's Court made this express declaration: (52 So. 2d 287)

> "We think that the evidence is sufficient to justify the finding of the chancellor that the appellants were engaged in the business of lending money in Mississippi at a greater rate of interest than 15 percent per annum, and that the decree of the lower court should be affirmed."

Compare *Broom's Legal Maxims*, 7th Ed., p. 948:

> "Omnia praesumuntur legitime facto donec probetur in contrarium."

Be mindful that that done was interstate at all times.

(3) Appellee's counsel, notwithstanding the facts were stipulated, assumes to say: (Br. p. 4)

> "* * * One of the cardinal principles of Mississippi jurisprudence is that the trier of fact, whether Court or jury, is not confined to a consideration of facts as such, but is entitled to draw every reasonable inference therefrom. * * *"

But in this case there was no proof whatsoever that any of the borrowers did not in good faith employ Finance, who satisfactorily to them performed the brokerage service for the compensation which they agreed to pay, not as interest but for value received in the employer-broker relationship, and the stipulated facts show expressly only an interstate

movement. Naught contra is found in Appellee's citation of *Jefferson* v. *Yazoo and M. V. R. Co.*, 194 Miss. 729, 11 So. 2d 442. But, where, as here, stipulation was as to that done, it is not competent to assume that that stipulated to have been done was not done, and especially to assume that what was stipulated to have been done was not done according to the stipulation, but was an illegal cover-up for a law violation, notwithstanding *Tower Underwriters, Inc.* v. *Lott*, 210 Miss. 389, 49 So. 2d 704, and other cases cited herein.

(4) Appellee's counsel say: (Br. p. 5)

> "Again, Appellant is in error in asserting that usury laws of either Mississippi or Louisiana are here involved. The validity of the notes taken by Finance and sent to Discount is in no way involved. Neither Discount nor any borrower is a party to this suit and no decision herein would be res adjudicata quo ad them."

But that done is stipulated, and that for determination by this Court is the power of Mississippi's Court in virtue of the facts stipulated to annul as to the parties contracting and performing, in manner and form as they did agree, so that the State might from Finance take, in virtue of a segmentation localizing as intrastate, the operation. Mississippi, when assuming to tax, must act as to that whereover its sovereignty is and not displace the law of Louisiana and the Constitution of the United States.

(5) Appellee's counsel say: (Br. p. 5)

> "• • • this Court will take no cognizance of the possible collateral effect of the final decision herein."

With deference, this Court has to take the case as made, and from that case consider that which is the supreme law of the land so that Mississippi may not, with deference, as she has done frequently before, assume to take that

which is not lawfully her due. If Appellee's theory of taxation were adopted, then, notwithstanding the facts and that they as stipulated showed a violation of the Constitution, Mississippi's court would have the right to assume that in passing on the facts, Mississippi's Court would have a right to determine as a fact that which was not a fact, and thereby subvert the Constitution, the declaration of *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832, to the contrary notwithstanding. Mississippi's label is not immune from constitutional examination here.

(6) No challenge can be made of the right of a person desiring to borrow $10.00 from a bank in Baton Rouge to employ a broker in Jackson to negotiate that transaction, and if it be that, in order to obtain that $10.00, the borrower in Jackson must have his note guaranteed, there is a liberty of contract recognized in all of Mississippi's decisions that this may be. Compare *Tower Underwriters, Inc.* v. *Lott, supra,* and other cases herein cited. But we reiterate Appellee does not show (a) that Appellant had the available capital thus to lend; (b) that Discount did not so have and was anxious thus to lend; and (c) no proof whatever was attempted as to the adequacy of the compensation to Finance for the rendition of the service, if that were competent, which, with deference, it was not, if, as we submit, the contract between the broker and the borrower was valid, and we challenge squarely that the several matters here recited as being "mere form" and not "substance" so are, because, as written, they were performed, and, so having been, Mississippi's taxing power is limited thereto.

(7) Appellee's counsel say: (Br. p. 5)

> "The fact that the note was made payable to Discount was form, not substance. It was unconditionally guaranteed by Finance. The fact that the printed form of note was dated at Baton Rouge was form—not sub-

> stance. It was actually executed and delivered to Finance in Jackson. The fact that Discount was the drawee in the draft was form—not substance. The draft was immediately cashed by Finance in Jackson."

The customer could have either cashed the draft with Finance or with any other person. Compare, Stipulation of Fact, No. 8, R. pp. 15-16:

> "8. * * * The customer can get the draft cashed elsewhere, but as a general rule the Defendant will cash it for him upon the customer's endorsing the draft. * * *"

But this Court, and not Mississippi's court, must as to the Constitution so say.

(8) Appellee's counsel say: (Br. p. 6)

> "* * * The trial court undoubtedly decided that by the circuitous device of having the note made payable to Discount, and guaranteeing it unconditionally, Finance could not convert what was in fact a loan into a brokerage transaction."

First, that is a question under the due process clause of taking away Finance's right to contract. No reason whatsoever in this record therefor appears. Second, that is not the stipulated fact, and as between customers it was handled straight out as a loan by Discount obtained in Baton Rouge and paid in Baton Rouge, and it was not within the power of the State of Mississippi, a stranger to the transaction, to impose a privilege tax upon that which was thus done. It might have been that $10,000 was thus loaned at a single time. The amount of the loans is not that which is controlling, but the manner wherein the business was, and uniformly, in accordance with the decisions of this Court, Mississippi's Court had precedently held, and, as we understand it, still holds, these transactions to be valid, but

apparently, as shown, notwithstanding their validity inter se, assumes to allow the taxing power to thereto attach.

(9) With deference, we challenge the statement squarely that the facts in the cases of *Pass* v. *New England Mortgage Security Co.*, 66 Miss. 365, 6 So. 239; *Allen* v. *Grenada Bank*, 160 Miss. 419, 133 So. 648; *Abraham* v. *Friendly Finance Co.*, 205 Miss. 71, 38 So. 2d 323, and *Tower Underwriters, Inc.* v. *Lott*, 210 Miss. 389, 49 So. 2d 704, are fundamentally different from the facts in the case at bar. On the contrary, they are, as we see it, precisely those stipulated, and it was upon the faith of them that this business was done, and under the law of Mississippi, Section 14 of its Constitution, there was by this decision substantially an impairment of the obligation of the contract. Compare *Wisconsin Lumber Co.* v. *State*, 97 Miss. 571, 54 So. 247; *Bank of Philadelphia* v. *Posey*, Suggestion of Error, 130 Miss. 825, 95 So. 135; *Leavenworth* v. *Claughton*, Suggestion of Error, 197 Miss. 606, 20 So. 2d 821; *Mississippi State Tax Commission* v. *Brown*, 188 Miss. 483, 193 So. 794. We are mindful of *Central Land Company of West Virginia* v. *Laidley*, 159 U. S. 103, 40 L. Ed. 91, and, with deference, the earlier rule followed by Mississippi's Court. The case of *Ohio Life Insurance & Trust Co.* v. *Debolt*, 16 How. 416, 14 L. Ed. 997, has much common honesty behind it.

(10) Our viewpoint is that, while it may have been within the power of Mississippi's Supreme Court to overrule these decisions, if they saw fit, in some aspects in the constitutional aspect here at issue they might not so thus do, for thereover Mississippi was without the requisite authority. The suggestion of the fact that Mississippi's Supreme Court overruled these decisions puts us in the attitude of having followed in good faith that which was declared by the Supreme Court of Mississippi to be valid, and to have conformed thereto in all things, and then, when we had so

done, it certainly could not be said that in thus following there was an intention on the part of Discount and of Finance to avoid the usury laws and commit a fraud on them, so as to authorize the Supreme Court to look through the form to the substance and declare the substance to have been other than what the form indicated, when under Appellee's assumption the form precedently had Mississippi's Court's sanction and in conforming to it was according to that which Mississipi's Court had advised those dealing therein that they might lawfully do.

Compare *Mississippi State Tax Commission* v. *Brown*, 188 Miss. 483, 193 So. 794, 802, wherein it is said:

> "• • • There should be stability in the law; and if every judge followed his personal opinion, rather than the judicial opinion of his associates and predecessors, there would be no such thing as a settled rule. The public could not safely rely upon the advice of counsel, who must form his opinion upon the decisions of the Court. This Court has given protection to citizens from the effect of overruling cases, holding that transactions had or done under a construction making the act valid at the time it was done continue legal, although afterwards a change of decision was made by the Court. • • •"

(11) That said by Appellee as to *Dixie Brokerage and Guaranty Co.* v. *Bailey*, — Miss. —, 55 So. 2d 438, is accurate, but that decision is in no way controlling in this Court, and with deference, the Mississipi Court by repeating its error cannot make a right out of two wrongs.

(12) As to Section 1521, we, with deference, challenge the statement that the facts could be interpreted otherwise than as stipulated and there was no possibility under stipulation of counsel for Finance to be a lender of money, and that required was an application by Mississippi's Court of the law of the land, including the Constitution of the United

States, to the facts as stipulated. Compare *Memphis Natural Gas Co.* v. *Stone, supra.* There was no authorization by this stipulation for the Court to find facts contrary to the specific stipulation, and especially to find facts contrary to the due performance by all customers of their contracts as valid contracts without complaint on their part, and as hereinabove shown, even a third person could not, were the contracts made in their favor, enforce them otherwise than as expressly made, and certainly the Supreme Court of Mississippi could not tax on the basis of fact that which was not a fact, and when it assumed to tax on the basis of a fact, when there was no such fact, then the due process clause came into operation and prevented the deprivation.

(13) Our response to counsel's inquiry (Br. p. 8) is that with the facts as stipulated, it is only a question of law on the face of the stipulation, and having stipulated that the borrower executed a note to Discount dated at Baton Rouge, payable at Baton Rouge, for the procuring of which loan Finance was paid a commission, we cannot perceive how it may be said that Discount did not do other than lend this money to the customer of Finance. Note the epitomy of the facts as given in the jurisdictional statement which are not challenged by appellee further than to claim that with these facts stipulated the court could convert, without proof, Finance into a lender, and through usury tax interstate commerce. This the Supreme Court of Mississippi has consistently denied up until the time of this decision, and this Court has consistently denied it throughout.

(14) Under alleged want of power on the part of Discount, the State other than through the Attorney General, may not question the power (*Kennington-Saenger Theatres* v. *State, ex rel. District Attorney,* 196 Miss. 841, 18 So. 2d

483, 153 A.L.R. 883), and the Attorney General of Mississippi may not challenge collaterally the power, of a Louisiana corporation, and, more important, the Supreme Court of Mississippi in no way sustained this contention, which, with deference, indicated the desperation whereto this tax gathering agency has been driven. Quo ad Mississippi, certainly Discount at Baton Rouge was not contravening any law within the State of Mississippi, and if the power of Discount at Baton Rouge was, as we insist is the case, a factor in this situation, the State of Mississippi thereasto under its taxing power could not, quo ad that done in Louisiana, extraterritorily tax, but, as shown in the jurisdictional statement, the entire transaction as a unit had to be considered as a unit in admeasuring the power of Mississippi to exact revenue therefrom, and a privilege tax might not thereon thus be.

(15) What Appellee overlooks is that Discount accepted every note that was sent to it, and for the origination of these notes thus to be transmitted, the customers at Jackson paid Finance the brokerage fees, and the instruments as evidenced created expressly that relationship and none other, and the tax collector, for purposes of gaining revenue for herself and Mississippi, may not exact dollars from Finance on a basis other than the true facts, and it is competent in dealing with the power of taxation for the taxpayer to drawn lines, and when these lines are drawn the law will regard them. Compare *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 76 L. Ed. 1102. Where a tax was imposed upon checks in excess of $10.00, a thrifty individual might deliver ten checks for a $100.00 debt, without being made liable for the tax. Compare *United States* v. *Isham*, 84 U. S. 496, 21 L. Ed. 728. When these customers and Finance found Mississippi's laws as they did find them, with the right for an agent to act, they

were within their constitutional rights thus to transact business, and when conforming to the decisions of Mississippi they did not commit a fraud by doing that which the Mississippi decisions said they might lawfully do.

III. Appellee's counsel say: (Br. p. 9.)

> "THE FEDERAL QUESTIONS HERE WERE NOT RAISED AT ALL OR WERE NOT TIMELY RAISED.",

whereto our responses are:

(1) Those set forth in the Jurisdictional Statement and in Appendices 4 and 5.

(2) Appellee's counsel say (Br. p. 9):

> "The Full Faith and Credit Clause is in no way involved in this case. Discount was not a party to this suit. Its rights could be in no way affected by this suit. No transaction between Finance and Discount was even remotely involved."

This we categorically and emphatically deny. Mississippi's power to tax was delimited by the entire transaction, and the connection of Discount therewith and the laws of Louisiana thereasto could not be overlooked. For precisely this reason we lost our case before this Court in *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178, where we succeeded in having Mississippi's Court erroneously sitused as subject to Mississippi's laws, a Tennessee contract. (Compare Jurisdictional Statement for other authorities.) Our viewpoint is that Appellant, as shown, raised the issue of deprivation of property without due process in a timely manner, and that thereunder Appellant might not be deprived of its property contrary to the constitution when that mandate was involved, and it, with deference, submits that, when the statute assumed to be made effective by the State of Mississippi

thus to do contravened the Commerce Clause and contravened the Full Faith & Credit Clause, the State of Mississippi could not use a statute, Section 9696-135, thus violating, as an instrumentality through which it might take for itself that which belonged to Appellant; in short, the utilization of a void statute as a predicate for a valid judgment. If the Statute upon which the judgment is based be void, that judgment in this Court is erroneous, and hereasto we have not a collateral but a direct attack.

(3) It is true that the unusual manner in which the State Court construed Section 9696-135, could not have been anticipated, but that which appellant did was to challenge under the deprivation clause, and its challenge under the deprivation clause put upon the State the obligation to bring forward a valid statute which would authorize the taking of Appellant's money, and when, in response to Appellant's challenge, Appellee produced as his sole warrant for judgment a statute contravening, with the interpretation placed on it by the Supreme Court, both the Commerce Clause and the Full Faith and Credit Clause, as well as the Due Process Clause, then the Appellee did not show a valid warrant whereunder it could under these facts take from Appellant that which was its own. In short, under a void statute, deprivation of property would occur, if, notwithstanding the demonstration of the invalidity, the State Court made it effective as a statute when it was not a statute, but on the contrary a nullity, and in this aspect the question, with deference, was as to both of these clauses actually raised in the State Court and actually passed on by the Supreme Court adversely when as to the stipulated facts the Supreme Court of Mississippi in passing on the Suggestion of Error in this case declared as hereinabove quoted (App. 2 to Jurisdictional Statement):

> "• • • Aside from the fact that the effect of the original opinion herein, and the earlier case of Alt v.

> Bailey, 52 So. 2d 283 (Miss. 1951), was to find that appellant, the Mississippi taxpayer, was loaning its own money *in a purely intrastate local activity*, the interstate commerce issue was not assigned as error on this appeal, or argued when the case was submitted. * * *" (Emphasis ours.)

Why the necessity of a definition of this being an "intrastate activity", if the Court were not viewing all of the facts as stipulated, and when the challenge was that deprivation without due process was occurring, it confessed and avoided by declaring its decision was that the activity was local and intrastate? Thus is sharply presented to this Court, under the deprivation assignment, whether that thus alleged by the Supreme Court of Mississippi is constitutionally accurate. In short, is that herein stipulated, *quo ad* the customers, Finance and Discount, "a purely intrastate, local activity"? If the Mississippi Court correctly thus held that that done, *quo ad* customers, Discount and Finance, was a local intrastate activity, and under the stipulated facts, it had authority so thus to do, then unquestionably Appellant's assignment of deprivation without due process in this particular aspect,—that is, Question 2,—was not appropriate and proper. Nevertheless, we do challenge that this Court will not, under the due process clause, split hairs when the local Court confesses it directly determined that activity, which is obviously interstate under the decisions here, to be intrastate and then in virtue of such determination denies a citizen the right to hold as his own under the deprivation clause against a void statute. Mississippi's court here specifically said it determined this to be a local activity—intrastate. This determination thus admitted to be made we specifically challenge, and, with deference, this well might be under the decisions of this Court a direct challenge, not only under the due process clause but under the commerce clause as well, for the State Court affirma-

tively showed that it adjudged the transaction to be local—intrastate, when per stipulation it was, under the decisions of this Court, interstate—unquestionably, and thereasto the State Supreme Court, with deference, most obviously completely missed the road. It is true that the Mississippi Court doth protest that it did not consider the assignment as to the Commerce Clause, but its sole reason therefor naively is that it had precedently adjudged that actually interstate to be intrastate, and having thus adjudged it would not again adjudge, notwithstanding its prior adjudication was palpably erroneous under multiplied decisions of this Court.

(4) Appellee's Counsel say (Br. p. 10):

> "• • • It cannot be argued here that the statute and ordinance were valid, in and of themselves, but invalid as applied to Appellant in this case, • • •"

That is Appellant's precise contention. Obviously this statute and this ordinance can be valid as to some, but invalid as to others, including Appellant (Compare *Kansas City Southern Railway Co.* v. *Anderson*, 58 L. Ed. 983, 233 U. S. 325; *Nashville C. & St. L. R. Co.* v. *Walters*, 79 L. Ed. 949, 294 U. S. 405); and when Appellee succeeded in having this statute and the ordinance making it operative at Jackson adjudged to be inclusive of the business done, *inter se* the customers, Finance and Discount, it was as to this construction a deprivation predicated upon a palpable violation of the Constitution. This Appellant is not interested in further than said Section 9696-135 unconstitutionally transgresses this particular appellant's particular rights, and when the Supreme Court of Mississippi held that this statute so thus did, and validly so did, so as to take from the Appellant in virtue of its terms $6,000, notwithstanding the challenge of invalidity by reason of non-conformity to the due process clause. The Supreme Court of Mississippi sus-

tained this statute as thus construed as against Appellant, and denied Appellant's Federal rights, and so thus doing appeal was.

(5) As to the jurisdictional statement, with deference, it speaks for itself, and we desire not to add aught thereto. And, with deference, Appellee is in error when she states that our chief reliance was the Commerce Clause. That whereupon reliance was the Due Process Clause and the manner of its violation is made plain to the best of our ability in the Jurisdictional Statement and the appendices, and repetition will not be.

We challenge the statement that the Supreme Court and the Circuit Court did not consider, in determining Section 9696-135 to be valid, that, under the facts as stipulated, the Appellant's business was, notwithstanding the stipulation, strictly an intrastate activity, purely local, just as it assumed to do in the *Memphis Steam Laundry* case, and if as a conclusion of fact a State Supreme Court might presume, from stipulations that are undisputed, that the Court might presume, as was here assumed to be done, contrary to the stipulation and without support therefor, then the Commerce Clause and the Full Faith and Credit Clause forthwith became dead letters and this Court will be bound to affirm, in virtue of the decision by the State Supreme Court, that its adjudication was exclusively upon a local ground, notwithstanding the stipulation on its face specifically raised the federal question and the local Supreme Court specifically declared that its determination was based upon that done being a mere intrastate, local activity. In short, the State Court having so thus said, it is unquestionably true that this Court could not thereasto grant reviews, but the crux of the case is did the Supreme Court of the State, in making this determination that it was purely an intrastate activity, conform its decision to the facts as stipulated and to the decisions of this Court as thereasto made, and if perchance the

State Court thereasto erred, then jurisdiction here is. Mississippi's Court plainly admitted its sustaining of the tax in virtue of a precedent finding that the entire activity was intrastate—not interstate.

As to that which was argued in the Supreme Court of Mississippi by Appellant, with deference, the same does not appear in the record, but the challenge was unquestionably made, and the Chief Justice and the Presiding Justice both so certified when the matter was before the Court en banc. See Appendix 3 to Jurisdictional Statement.

(6) In Appellee's brief in the Supreme Court of the State of Mississippi, at page 2, it was specifically said:

> "The facts were agreed upon in advance of the trial, together with the despositions of one Harry L. Bevins, which has been taken by agreement of the parties. RP 20 to 43. In the record the agreed facts are found beginning on page 14 and ending on page 19 thereof. These facts are so briefly stated in the record that we do not deem it worth while to repeat them in this brief."

(7) It is true that the first express reference to the Commerce Clause occurred on suggestion of error, but (1) The Supreme Court of Mississippi specifically showed that which had bottomed Mississippi's taxing power upon the business of Appellant being a local, intrastate activity, whereover plenary jurisdiction was, and thus directly decided that under the stipulation the statute was valid in virtue thereof, and therefore did not by its enforcement (when it was void) deprive Appellant of property without due process. Appellant's contentions are (1) with deference, that the Mississippi Court necessarily determined, as it expressly so declared, the activity of Appellant to be local and intrastate, contrary to the stipulation, and in addition, when a statute void under the Constitution for a contravention thereof is enforced by a decision of the

Supreme Court of the State, then the enforcement of that which is a nullity under Federal law essentially deprives of property contrary to the due process clause, and the same is true where the contravention is by failure of the State to recognize the binding force and effect of the full faith and credit clause. With deference, the validity of statute was questioned throughout after the motion for a new trial, essentially involving these factors thus inherently integrated.

(8) As to the cases cited, pp. 13-14 of Appellee's response, we do not controvert them, and the rule announced in them is correctly held, but herein Section 9696-135 imposing this tax was directly challenged as being a deprivation, and that challenge is distinctly denied. Hence, these decisions are in no way apposite, especially when Mississippi's Court based its decision solely upon its determination that the stipulated facts showed a local intrastate operation, when the decisions of this Court, properly interpreted, show beyond peradventure that the operation was exclusive interstate.

IV. Appellee's counsel say: (Br. p. 13)

"NO SUBSTANTIAL FEDERAL QUESTION IS HERE INVOLVED.",

whereto our responses are:

(1) The cases collected in the jurisdictional statement, which admeasure the jurisdiction.

(2) It is not true, with deference, that under a privilege tax conditioning the right to do business a state may prohibit one from engaging in interstate commerce, even though as to intrastate commerce the statute is perfectly valid, and if it were not confined to intrastate commerce would be invalid. Compare as to Mississippi Statutes, the case of

Pullman Co. v. *Adams,* 189 U. S. 420, 47 L. Ed. 877. Appellee fundamentally, with deference, misconstrues the cases of *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, 84 L. Ed. 565; *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359, 85 L. Ed. 888; *Stone* v. *Interstate Natural Gas Co.,* 308 U. S. 522, 84 L. Ed. 442; *Southern Natural Gas Corporation* v. *Alabama,* 301 U. S. 148, 81 L. Ed. 970; *Memphis Steam Laundry Cleaner, Inc.* v. *Stone,* No. 253, October Term, 1951, 20 L. W. 4162, especially, for example, the last cited. The Mississippi statute, as construed by Mississippi's Supreme Court, was held invalid by this Court in two aspects, (a) the discrimination feature, whereasto the appellee adverts appropriately, but (b) the prohibition of the interference which, with deference, the Appellee completely overlooked. That part of the opinion whereon the Appellant principally relies is:

(20 Law Week pages 4163-4:)

> "To sum up, we hold that the tax before us infringes the Commerce Clause under either interpretation of the operating incidence of the tax. The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states. The tax imposed in this case made the Mississippi state line into a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause."

And the same distinction may be observed in the other cases. Note especially *Stockard* v. *Morgan,* 185 U. S. 27, 46 L. Ed. 785.

(3) Appellee's counsel declare: (Br. p. 15)

> "The buying and selling of notes and commercial paper by citizens of one state from and to citizens or

corporations in another state is not interstate commerce.

"*Hemphill v. Orloff*, 277 U. S. 537, 72 L. Ed. 978;
"*Blumenstock v. Curtis Pub. Co.*, 252 U. S. 435, 64 L. Ed. 649."

In addition to these cases, counsel might have added as appropriate textbooks 15 *C. J. S.*, "Commerce", Sec. 22, p. 283, Sec. 32, p. 318; and 11 *Am. Jur.*, "Commerce", Sec. 32, p. 33, Sec. 86, p. 78; *Stanford Home Co.* v. *Davis*, 217 F. 904, 915. And unquestionably in *Hemphill* v. *Orloff, supra*, there was involved the right of a Massachusetts Trust as a corporation to do business in Michigan, and after holding that thereasto Michigan might thus validly legislate, in the course of the opinion it was said:

"* * * Such business is not interstate commerce. Nathan v. Louisiana, 8 How. 73, 12 L. Ed. 992; Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 162, 51 L. Ed. 415, 423, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U. S. 436, 443, 64 L. Ed. 649, 653, 40 Sup. Ct. Rep. 385."

In our Jurisdictional Statement we effectively, with deference, differentiated *Nathan* v. *Louisiana, supra*, in Appendix 5, and make no further reference thereto. As to *Paul* v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357, the decision that insurance was not commerce thereafter remained the law for approximately 75 years, but then came, by reason of present day exigencies, the great case of *United States* v. *Southeastern Underwriters Assoc.*, 322 U. S. 533, 88 L. Ed. 1440, subsequent whereto the Congress, pursuant to its plenary power, passed the *McCarran Act*, 15 USCA Sec. 1011, c. 20, Sec. 1, 59 Stat. 33, and the majority opinion in the *Southeastern* case, among other things expressly said: (88 L. Ed. 1453)

"* * * But both before and since Paul v. Virginia this Court has held that Congress can regulate traffic though it consist of intangibles."

Compare *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 76 L. Ed. 1038; *Champion* v. *Ames,* 188 U. S. 321, 47 L. Ed. 492; *Electric Bond & Share Co.* v. *Securities & Exchange Commission,* 303 U. S. 419, 82 L. Ed. 936; and *The Assoc. Press* v. *National Lab. Rel. Bd.,* 301 U. S. 103, 81 L. Ed. 953.

It was further declared in the *Southeastern* case, by the majority opinion: (88 L. Ed. p. 1457)

"* * * No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance."

And thereupon in his dissenting opinion Chief Justice Stone cites *Blumenstock Adv. Agency* v. *Curtis Pub. Co.,* 252 U. S. 456, 64 L. Ed. 649, and again on page 1467 and 1469 as having been overruled.

Further, as was stated in 15 *C.J.S.* "Commerce," Sec. 22, Supp. p. 31:

"§ 22. Insurance:

"Since the publication of Corpus Juris Secundum insurance business conducted across state lines has been held to be interstate commerce within the regulatory power of Congress; * * *."

Compare 29 *Am. Jur.,* Sec. 35, Supp. p. 9, wherein cognizance is taken of the overruling of *Paul* v. *Virginia, supra.* As to the subsequent history of the *Southeastern* case, compare *State Farm Mutual Auto Insurance Co.* v. *Duel,* 324 U. S. 154, 160, 89 L. Ed. 812; *Prudential Life Insurance Co.* v. *Benjamin,* 328 U. S. 408, 419, 90 L. Ed. 1343. Furthermore, while we are cognizant of that said in *Woods* v. *Inter-*

state Realty Co., 336 U. S. 909, 69 Sup. Ct. 514, 337 U. S. 535, 93 L. Ed. 1524, that all declarations were controlling, with deference, this remark in passing is not now so. The case of *New York ex rel. Hatch* v. *Reardon*, 204 U. S. 152, 162, 51 L. Ed. 415, 423, contains nothing contra.

Next is cited *Blumenstock Bros. Adv. Agency* v. *Curtis Pub. Co.*, 252 U. S. 436, 443, 64 L. Ed. 649, 653, whose holding is accurately epitomized in Syllabus 3:

> "3. The merely incidental relation to interstate commerce of transactions concerning advertising in periodicals which are to be circulated and distributed throughout the United States will not support the Federal jurisdiction of a suit brought under the provisions of the Sherman Anti-trust Act of July 2, 1890, § 7, creating a cause of action in favor of any person to recover by suit in any Federal district court in the district in which the defendant resides or is found three fold damages for injury to the business or property by reason of anything forbidden and declared unlawful in the act, on the theory that defendant's conduct in respect to such matters is forbidden by that act as a monopoly or attempted monopoly of interstate commerce."

Compare, however, cases contra, collected in the Jurisdictional Statement.

Incidentally, consider further as remotely apposite *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 341, 60 L. Ed. 679.

(4) Appellee's counsel next contend (Br. p. 15):

> "Exchange and money brokers are not engaged in commerce and may be required to pay a state license tax.
>
> "*Nathan v. Louisiana*, 8 How. 73, 12 L. Ed. 993;
>
> "*Hall v. Geiger-Jones Co.*, 242 U. S. 539, 61 L. Ed. 480;
>
> "*Ficklen v. Taxing Dist.*, 145 U. S. 1, 36 L. Ed. 601;
>
> "*Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290;

"*Anderson* v. *United States*, 171 U. S. 604, 43 L. Ed. 300;
"*Minnesota v. Blasius*, 290 U. S. 1, 78 L. Ed. 131."

The *Nathan* case has been distinguished supra. *Hall* v. *Geiger-Jones Co.* contains, with deference, nothing contra.

The *Ficklen* case, with deference, is in favor of appellant, and, among other things, it was said (36 L. Ed. p. 606):

> "The language of the court in Lyng v. Michigan, 135 U. S. 161, 166 (34: 150, 153) 3 Inters. Com. Rep. 143, was: 'We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether, by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.' But here the tax was not laid on the occupation or business of carrying on interstate commerce, or *exacted as a condition of doing any particular commission business*, and complainants voluntarily subjected themselves thereto in order to do a general business." (Emphasis ours.)

And note the conclusion of the opinion, where it is said (36 L. Ed. 607):

> "• • • What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record."

Hopkins v. *United States*, 171 U. S. 578, 43 L. Ed. 290, is in no way controlling contra.

But, with deference, that is not the law today, this case having been decided in 1898. But compare *Stockyards and*

Packers Act of 1921, 7 USCA Sec. 181, c. 642, S. 1, 42 Stats. 159, and Sec. 212, c. 64, S. 311, 42 Stats. 167; and *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 565, 69 L. Ed. 443; and *Rosenberger* v. *Pacific Exp. Co.*, 241 U. S. 48, 60 L. Ed. 880.

Anderson v. *United States*, 171 U. S. 604, 43 L. Ed. 300, with deference, is not apposite for the same reasons. Compare *Stafford v. Wallace*, 258 U. S. 495, 66 L .Ed. 735, 23 A.L.R. 229; *U. S.* v. *National Assoc. of Real Estate Boards*, 339 U S. 485, 492, 94 L. Ed. 1007.

Minnesota v. *Blasius*, 290 U. S. 1, 78 L. Ed. 131, with deference, is in no way apposite, but strongly finds for Appellant.

(5) Appellee's counsel say (Br. p. 15):

> "If only a part of the business is carried on within the taxing authority a privilege tax may be imposed and collected.
>
> "*Horning v. District of Columbia*, 254 U. S. 135, 65 L. Ed. 185."

As to *Horning* v. *District of Columbia*, this case involved a violation of a Federal act applicable to Pawn Brokers within Washington, and is, with deference, inapposite and not in any way in conflict with the cases, especially those from Mississippi, beginning with *Postal Tel. & Cable Co.* v. *Adams*, 155 U. S. 677, 39 L. Ed. 311, cited in the Jurisdictional Statement.

(6) Appellee's counsel contend: (Br. p. 15)

> "A state may require the payment of an occupation tax from one engaged in both intrastate and interstate commerce where the tax is not increased because of the interstate business carried on."

and therefore cite *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 79 L. Ed. 934, which case

is favorable to Appellant, the holding therein being in part: (79 L. Ed. 941)

> "There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce *or the privilege of engaging in it.* And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. Leloup *v.* Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 S. Ct. 1380, 2 Inters. Com. Rep. 134. * * *" (Emphasis ours)

(7) Appellee's counsel say: (Br. p. 15)

> "If the business is inseparable the tax is valid."

citing *Pacific Telephone & Telegraph Co.* v. *Tax Commission of Washington,* 297 U. S. 403, 80 L. Ed. 760; but, with deference, an examination shows naught contra to the claims here made.

(8) We have no fault to find with:

Cargill v. *Minnesota,* 180 U. S. 452, 45 L. Ed. 619
Caldwell v. *North Carolina,* 187 U. S. 622, 42 L. Ed. 336
Rearick v. *Pennsylvania,* 203 U. S. 507, 51 L. Ed. 295
Dozier v. *Alabama,* 218 U. S. 124, 54 L. Ed. 965
Jones, et al. v. *Lamensdorf, et al.,* 175 Miss. 565, 167 So. 624
St. Louis Poster Adv. Co. v. *St. Louis,* 249 U. S. 269, 63 L. Ed. 599
Williams v. *Fears,* 79 U. S. 270, 45 L. Ed. 186
Browning v. *Waycross,* 233 U. S. 16, 58 L. Ed. 828.

which, so far as apposite, support Appellant, with deference.

(9) As to *Superior Oil Co.* v. *Knox,* 208 U. S. 390, 74 L. Ed. 504, naught contra therein is, and compare *Richfield*

Oil Corp. v. *State Board of Equalization,* 329 U. S. 69, 82, 91 L. Ed. 80: (p. 92)

> "• • • And cases like Superior Oil Co. *v.* Mississippi, 280 U. S. 390, 74 L. Ed. 504, 50 S. Ct. 169, are relied upon as indicating that delivery to the purchaser is not sufficient. That case arose under the Commerce Clause. Mississippi was upheld in its effort to tax a distributor or wholesaler who purchased gasoline and later took it to Louisiana for sale. The court said, p. 395, that although the course of business indicated the likely destination of the oil, it was 'in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes.' The court held, therefore, that the tax was not on good moving in interstate commerce. But it added, p. 396, 'Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may effect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here.' "

Herein every draft and every note traveled, precedently to this tax imposition, to Louisiana, and after they had so thus done and the business was an accomplished fact retroactively with the penalty this privilege tax was sought to be collected.

(10) We do not contravert *Interstate Oil Pipeline Company* v. *Stone,* for it is eminently correct, and Mississippi's Supreme Court has here held that this current of commerce existed, and existing, the same might be made subject to a precedent privilege tax, because it constituted a mere intrastate transaction, the decisions of this Court to the contrary notwithstanding. Learned counsel for Appellee advert to the fact that the residence of Discount at Baton Rouge was quite irrelevant. With deference, it is the cornerstone in this aspect of the attack.

(11) Naught contra is found in *United States Fidelity & Guaranty Company* v. *Kentucky*, 231 U. S. 394, and *McGoldrick* v. *Berwind-White Coal Mining Co.*, supra, has been considered before.

(12) The reliance upon *Gundling* v. *Chicago*, 177 U. S. 183, 44 L. Ed. 725, is, with deference, ill timed, for it involved only a tax upon a cigarette dealer, which is wholly here beyond the issues. Compare *Breard* v. *Alexandria*, 341 U. S. 622, 630, 95 L. Ed. 1233.

(13) Counsel claim: (Br. p. 17)

> "There is here no question of due process that this Court may review."

And therefor cite: *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 41 L. Ed. 369; *Tracy* v. *Ginzberg*, 205 U. S. 170, 51 L. Ed. 755; *Iowa Cent. R. Co.* v. *Iowa*, 160 U. S. 389, 40 L. Ed. 467; *Simon* v. *Craft*, 182 U. S. 427, 45 L. Ed. 1165; *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, 80 L. Ed. 772; *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 73 L. Ed. 856, and our responses hereasto are, with deference:

1. That, properly interpreted, naught contra appellant's contentions may be therein found.

2. Appellee has to a marked extent misconceived the import of these decisions.

Adverting to each in order:

(a) *Fallbrook Irrigation District* v. *Bradley*, with deference, involves the right to irrigate and is wholly here inapposite.

(b) The *Ginzberg* opinion is inapposite, the opinion being substantially epitomized thus:

> "2. The decision of a state court involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without

due process of law, simply because its effect is to deny his claim of ownership in such property."

(c) *Iowa Cent. R. Co.* v. *Iowa* is inapposite, merely holding that a state might refuse a jury trial.

(d) *Simon* v. *Craft* is inapposite, involving merely the right of an alleged lunatic to be personally present at a hearing.

(e) *Bayside Fish Flour Co.* v. *Gentry,* merely sustained a statute as to processing fish, which, with deference, is inapposite here.

(f) *Standard Oil Co.* v. *Marysville* is inapposite, involving a storage below ground of petroleum products.

(14) As to *Nickey* v. *State of Mississippi,* 292 U. S. 393, naught contra therein is found, involving as it did ad valorem taxation and naught else.

As a conclusion of that situation it is, with deference, submitted, that not a single citation made by Appellant in the Jurisdictional Statement showing (a) deprivation without due process, and (b) deprivation per quod through enforcing a void statute under the Commerce Clause and under the full faith and credit clause, is brought forward, but, with the utmost deference, those cases cited and relied on are inapposite, unless and except they be in the class whereasto a fundamental change was wrought by this Court in its policy, quo ad the Constitution, on certain specific bases, and since the Supreme Court of Mississippi adjudged Section 9696-135 as a valid exercise of the taxing power, quo ad the business of Appellant, specifically stipulated as to, the result is that when thereby the Federal claim was denied, Appellant had as of right the right to come to this Court when the Federal claim was held by the State Supreme Court to be baseless.

V. Appellee's counsel say: (Br. p. 18)

"APPEAL HERE IMPROVIDENTLY TAKEN, APPEAL PAPERS SHOULD BE REGARDED AND ACTED UPON AS A PETITION FOR WRIT OF CERTIORARI, AND CERTIORARI SHOULD BE DENIED.",

whereto our responses are:

(1) It specifically asks that should it have inadvertently utilized appeal where alone certiorari lay, then that its petition be thus considered, and Appellee thus states: (Br. p. 18)

> "The claim here actually is that Appellant's rights, privileges, or immunities were violated by the *judgment.*"

But we restate that Section 9696-135 imposed as construed by Mississippi's Court this privilege tax, and the statute as thus interpreted, contrary to the Federal Constitution, deprived Appellant of its property. The sole basis for the judgment was the statute. Without the statute, no judgment might have been, and, when Appellant brought the case here, it solely so did in virtue of its challenge to Section 9696-135, quo ad Appellant's business as stipulated, and thereasto we affirm our right.

If we concede, which we do not, that Appellant could come here only by grace, Appellant so specifically in its petition asked, pursuant to permission therefor lawfully by statute granted. Even though appeal was not appropriate, still certiorari would be. There is, with deference, the utmost confusion in the decisions of this Court as to the dealings in commercial paper, and the public welfare does demand that rectification thereasto be wrought. Compare the declaration in *Hemphill* v. *Orloff*, supra:

> "Such business is not interstate commerce."

Thereasto, under the insurance case and the decisions collated in the jurisdictional statement, this declaration, with

deference, is not now the law and should not be allowed to stand and thus continue to mislead.

Appellant has examined all decisions relied upon hereasto by Appellee and, with deference, submits the same to be inapposite. This case involves the most important question of how far, when facts are expressly stipulated showing an interstate movement, the State Court may presume contrary to that stipulated, and especially how far the State Court under its power to prevent the exaction of usury may sustain as valid a privilege tax prohibiting expressly interstate commerce, and further how, if the parties to the transactions actually do interstate commerce in form for the express purpose of avoiding Mississippi sovereignty, they may be taxed therefor and prohibited their constitutional right to engage in interstate commerce. By this line of decisions, with deference, Mississippi's Supreme Court has "opened Pandora's box", and this Court will be called upon the rewrite its doctrines of constitutional law and subordinate its sovereignty when without warrant the State Court presumes a fact to be, wherefor, with deference, it was without authority.

Pursuant to the provisions of Rule 38 of this Court, 28 *U.S.C.A.*, "RULES", Supreme Court, p. 66, as to certiorari it is respectfully submitted:

(a) It is respectfully submitted that, if we are in error, then there is the right to come here by certiorari as a matter of grace.

(b) The questions involved with the authorities thereasto apposite are contained in the Jurisdictional Statement with the Appendices 4 and 5, and in this brief in reply to Appellee's motion to dismiss or affirm, and that in them and each of them said is here adopted by reference and not expressly reiterated to save prolixity.

(c) The petition for appeal, the assignment of errors and the Jurisdictional Statement specifically disclose the questions presented and the reasons relied on including the authorities thereasto.

(d) It is respectfully submitted that the questions are of great public importance as is evidenced by the litigation thereasto, and the Supreme Court of the State of Mississippi has fundamentally changed its viewpoint (Compare *Tower Underwriters, Inc.* v. *Lott,* and other cases cited supra), and hereasto announced a new and strange doctrine subverting constitutional rights, said decisions herein and that in *Alt* v. *Bailey, supra,* being, with deference, not in accord with the controlling decisions of this Court.

(f) Notice of this response has been filed with counsel for Appellee.

(g) Wherefore, it is respectfully submitted that the motion to dismiss or affirm should be overruled, with a notation of probable jurisdiction, but, due to the fact that the case has been so fully briefed on this motion to dismiss or affirm, it is respectfully suggested that it would be appropriate, that the motion be passed for a consideration with the merits.

Respectfully,

Ross R. Barnett,
P. Z. Jones,
Malcolm B. Montgomery,
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APPENDIX "A"

AN ORDINANCE LEVYING A PRIVILEGE LICENSE ON EACH PRIVILEGE ON WHICH A MUNICIPAL TAX IS AUTHORIZED BY STATE LAW AND PROVIDING PENALTIES FOR NON-PAYMENT, BOTH IN THE MAXIMUM AMOUNT PROVIDED BY STATE LAW, FOR THE EXERCISE OF EACH TAXABLE PRIVILEGE IN THE CITY OF JACKSON, MISSISSIPPI: PROVIDING FOR EXEMPTION AND THE METHOD FOR CLAIMING THE SAME.

Be it ordained by the Council of the City of Jackson:

Section 1. That on each privilege exercised within this city for which a Municipal privilege license tax is authorized by the laws of the State of Mississippi, the City of Jackson hereby levies a privilege license tax on each such privilege in the maximum amount authorized by the laws of the State of Mississippi. Each license shall be issued for only one year, or such part thereof as may be otherwise provided, and shall not be transferable. Each person, firm, or corporation shall procure such license and pay said tax to the City of Jackson before commencing such business therein, and shall renew such license and pay such tax annually thereafter while continuing to engage in such business; but such license may be renewwed at any time within the month in which the preceding license tax was paid without being delinquent.

Section 2. That if the taxpayer shall fail to procure such license and pay such tax as and when provided in the preceding section, then the Tax Collector shall, in addition to such tax, collect a penalty thereon in the maximum amount authorized in such case by the laws of the State of Mississippi. A license certificate shall be issued such delinquent taxpayer upon paying said penalty, and said certificate shall show that it was issued for damages and penalties for delinquency in the payment of such tax. The taxpayer shall likewise be guilty of a misdemeanor for failure to pay such tax when due, and upon conviction thereof, in addition to said civil penalty, may be fined and imprisoned therefor as authorized by state law.

Section 3. That any person exempt under state law from the payment of such tax shall be exempt from such tax to the City of Jackson. Such exemptions may be claimed for the reasons and in the manner in such cases provided by State law. When an exemptionist thus establishes his exemption from such tax, the Tax Collector shall issue an exemption certificate to him which shall be renewed each year and entitle such person individually to exercise such privilege within the City of Jackson for the current period thereof without paying such license tax. Said exemption certificate, however, shall not entitle any other person, firm, or corporation to enjoy the benefit thereof, directly or indirectly, without paying such license tax.

Section 4. That, for cause, this ordinance shall be effective on and after this date.

Approved:

LELAND SPEED, *Mayor;*
R. S. WITHERS, *Commissioner;*
D. B. SHARRON, *Commissioner.*

Attest: Mrs. J. R. Skinner, City Clerk.
[SEAL.]

I, Mrs. J. R. Skinner, the duly appointed, qualified and acting City Clerk and lawful custodian of the minutes of the Council and seal of said city, certify that the foregoing is true and exact copy of an ordinance passed by the City Council at its regular meeting on August 1, 1946 and recorded in Minute Book "W", page 395.

Witness my signature and official seal of office this 22d day of March 1952.

MRS. J. R. SKINNER,
City Clerk.

JUNE 2, 1952.

Per Curiam Decisions.

No. 688. HAYS FINANCE CO., INC. ET AL. *v.* BAILEY, STATE TAX COLLECTOR. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Ross R. Barnett, P. Z. Jones, Malcolm B. Montgomery* and *Garner W. Green* for appellants. *Hubert Slaton Lipscomb* for appellee. Reported below: 214 Miss. —, 56 So. 2d 76.